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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THE STATE OF MISSOURI,
THE MISSOURI DEPARTMENT OF REVENUE and the
DIRECTOR OF THE MISSOURI DEPARTMENT OF REVENUE,
WILLIAM H. MELCHER, Acting Director,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the federal government have standing to claim that its independent contractor is not required to pay Missouri sales and use taxes when the federal government is not contractually obligated or otherwise bound to reimburse the contractor's payment of those taxes?

2. Should a district court abstain on the grounds of comity and federalism from resolving a question of first impression involving the construction of Missouri's revenue laws presented by the federal government on behalf of its independent contractor when there is a pending state proceeding brought by the contractor to resolve the question presented to the district court?

3. Does the Tax Injunction Act (28 U.S.C. § 1341) deny jurisdiction to a district court over the federal government's claim that its independent contractor's purchases are not subject to Missouri sales and use taxes pursuant to Missouri law?

4. Are a federal contractor's purchases of personal property excluded from Missouri sales and use tax pursuant to the resale exclusion when the contractor orders the property, pays for the property, retains physical possession of the property and employs the property to discharge its own contractual obligations?

5. Is an award of monetary relief against Missouri permissible on the federal government's quasi contract or indebitatus assumpsit claim when the funds the federal government seeks to recover are those transferred to Missouri by independent third parties and the federal government fails to establish both the amount of money Missouri received and its entitlement to those funds?

LIST OF PARTIES

The defendants-appellants to the proceedings below were the petitioners State of Missouri, the Missouri Department of Revenue and the director of the Missouri Department of Revenue, Duane Benton, who was sued in his official capacity. The office of the director of the Missouri Department of Revenue is now held by William H. Melcher, acting director, and he has been substituted for Duane Benton as a petitioner. Rule 35.3. The United States of America was the plaintiff-appellee below and is the respondent herein.

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WILLIAM H. MELCHER, Acting Director,

Petitioners,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners, the State of Missouri, the Missouri Department of Revenue, and the Director of the Missouri Department of Revenue respectfully pray that the Court issue a writ of certiorari to review the opinion of the United States Court of Appeals for the Eighth Circuit in *United States of America v. Duane Benton, Director of Revenue, Missouri Department of Revenue and the State of Missouri*, No. 91-2206 (September 16, 1992).

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals is reported as *United States v. Duane Benton, Missouri Department of*

Revenue and the State of Missouri, 975 F.2d 511 (8th Cir. 1992), and is reprinted in the appendix at page A-2. The district court's opinion is unreported, and is reprinted in the appendix beginning at page A-19. The district court modified this order and the modification is reprinted at A-16. The district court's memorandum opinion and order addressing jurisdictional issues is published at 729 F.Supp. 671 (W.D. Mo. 1990), and is reprinted in the appendix at page A-37.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. §§ 1331 and 1345, the respondent brought this suit in the Western District of Missouri. On February 1, 1990 the district court denied petitioners' motion to dismiss, see page A-37, and on October 26, 1990, granted respondent's motion for summary judgment. See page A-19. Thereafter, the court modified its order on March 25, 1991. See A-16.

On petitioners' appeal, the Eighth Circuit, on September 16, 1992, entered an opinion affirming in part the judgment entered by the district court and remanding the case. See page A-2. A timely petition for rehearing or rehearing en banc was filed on September 29, 1992, and was denied on November 6, 1992. See page A-1.

The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

1. 28 U.S.C. § 1341 provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

2. FAR 31.205-41(a)(1) and (b)(3) provide in relevant part:

> (a) The following types of costs are allowable:
>
> (1) Federal, State, and local taxes (see Part 29), except as otherwise provided in paragraph (b) below . . ..
>
> * * *
>
> (b) The following types of costs are not allowable:
>
> * * *
>
> (3) Taxes from which exemptions are available to the contractor directly, or available to the contractor based on an exemption afforded the Government . . ..

The complete text of this regulation is set forth in the appendix. A-49.

3. Mo. Rev. Stat. § 144.010.1(8), (Supp. 1992) provides in relevant part:

> *"Sale at retail"* means any transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration . . ..

The complete text of Section 144.010 is set forth in the appendix. A-52.

4. Mo. Rev. Stat. § 144.010.1(1) provides in relevant part:

> *Rate of Tax.* —1. A tax is hereby levied and imposed upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state. The rate of tax shall be as follows:

> (1) Upon every retail sale in this state of tangible personal property, a tax equivalent to four percent of the purchase price paid or charged . . ..

The complete text of Section 144.020 is set forth in the appendix. A-57

5. Mo. Rev. Stat. § 144.190.2 and 3 (Supp. 1992) provides:

> 2. If any tax, penalty or interest has been paid more than once, or has been erroneously or illegally collected, or has been erroneously or illegally computed, such sum shall be credited on any taxes then due from the person legally obligated to remit the tax under sections 144.010 to 144.510, and the balance, with interest as determined by section 32.065, RSMo, shall be refunded to the person legally obligated to remit the tax, but no such credit or refund shall be allowed unless duplicate copies of a claim for refund are filed within three years from date of overpayment.
>
> 3. Every claim for refund must be in writing under oath, and must state the specific grounds upon which the claim is founded. Any refund or any portion thereof which is erroneously allowed, may be recovered in any action brought by the director of revenue against the person legally obligated to remit the tax. In the event that a tax has been illegally imposed against a person legally obligated to remit the tax, the director of revenue shall authorize the cancellation of the tax upon his record.

The complete text of Section 144.190 is set forth in the appendix. A-60.

STATEMENT OF THE CASE

The petition arises from the Eighth Circuit Court of Appeals' affirmance of the district court's entry of summary judgment in favor of the United States on its claim that it is entitled to recover

taxes paid by third parties to Missouri and from the court's entry of a judgment declaring that the personal property purchased by the government's independent contractor was excluded from state sales and use taxes pursuant to state law.

Olin Corporation ("Olin") entered into a contract (the "Contract") with the Department of the Army to operate and maintain the Lake City Army Ammunition Plant ("Plant") located outside Independence, Missouri. R 3.[1] Olin is an independent contractor and a private, for profit, business corporation that entered into the Contract for a profit. R 790 and 1080. Olin is not an instrumentality of the United States. R 796. Olin is contractually obligated to purchase the personal property necessary to operate the Plant and Olin did so. R 773-74. Olin issues checks from its own account to pay for the property. R 820, 1109. The funds expended by Olin for the property were not government funds and the government cannot issue checks, drafts, or money orders on the accounts used by Olin to purchase this property. R 821, 1109. Olin paid sales and use taxes on some of the property it purchased for use at the Plant.

The Contract requires the government to reimburse Olin for all purchases of personal property necessary for the operation of the Plant and it has done so after the property is delivered to the Plant. R 773, 776, 779, 1111. However, pursuant to the Contract, the government is not required to reimburse Olin for "[t]axes from which exemptions are available to the contractor directly, or available to the contractor based on the exemption afforded the Government." R 745, ¶ 73, 746-47, ¶¶ 76-77. Notwithstanding the government's claim in this suit that Olin's purchases of property are excluded from state taxes under state law, the government reimbursed Olin for its payment of taxes. The

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[1] Citations to the record ("R") contained in this petition are made for the convenience of the court and refer to the Joint Appendix filed in the Eighth Circuit Court of Appeals.

government did not dispute any facts set forth in Missouri's motion for summary judgment. R 1329.

The federal government contends that Olin's purchases of tangible personal property to operate the Plant are not subject to Missouri sales and use tax because that property was purchased for resale to the government. Under Missouri law, tangible personal property purchased for resale is not subject to sales and use taxes. Because the resale exclusion is dependent upon the facts of a transaction, a detailed analysis of those facts is set forth below.

Olin ordinarily uses a purchase order to purchase property. R 1061-62. This purchase order directs the vendor to transfer title to the property purchased to the government upon delivery of the property. R 691, 825. Consequently, Olin never possesses title to the property it purchases. Olin executes contracts in its own name for the purchase of the property necessary to operate the Plant. R 779, 795. Olin uses the property it purchases to fulfill its prime contract function and to fulfill its private interest function. In most instances, the property purchased by Olin is used to perform the Plant's mission, which is to manufacture small caliber ammunition. R 814. Olin ordered all the property which the federal government claims is not subject to tax, R 819 and 829, from vendors of its choosing. R 819. This purchase ordinarily occurs when Olin mails a purchase order to an Olin selected vendor, R 1061-62, after Olin determines the quantity of property to order. R 819. Olin is not required to secure the government's specific approval for each purchase. R 804. Olin describes its purchase of the property as a service. R 1119. The property is shipped to Olin at the Plant. R 1086. "The validity, construction and interpretation of this [Purchase] Order shall be governed by the laws of the State of Missouri." R 691, ¶ 19. No vendor has questioned Olin's power to arrange a transfer the property's title. R 1090.

When the property arrives at the Plant, Olin unloads the property, verifies the count, inspects the property, prepares a receiving report, and decides whether to place the property in inventory or deliver it to a needed area. R 819, 1081-82. The government does not take physical delivery of the property from the vendor. R 1172. For the most part Olin employees and subcontractors physically employ and utilize the property to operate and maintain the Plant and to build an end product (ammunition). R 1119-20, 1151. Olin does not consider the property it purchases to be an end product because Olin has access to the property in their operation of the Plant and the manufacturing of ammunition. R 1156. Specifically Olin employs the property in that they take action with, against, or with the assistance of the property and they do so in furtherance of the services they are contracted to provide. R 1125.

Olin's only payment from the government for the property is by way of reimbursement for the property's cost. R 1133. In addition to this reimbursement for the purchase price of tangible personal property, Olin receives a base fee and can receive an award fee under the Contract. R 42-44. The Contract does not provide that any portion of the base or award fee are to compensate Olin for the sale of property to the government. *Id.* Rather, it is to compensate Olin for its services, not the sale of property. R 1133-34. Indeed, nowhere in the Contract is there any mention that the tangible personal property acquired by Olin is sold to the government. There is no certainty that Olin will receive any award fee and if such a fee is received, it is based on the government's overall judgment of how effectively Olin performs its service. R 1134-36.

Three of the factors Olin was evaluated on to determine its award fee were 1) the consumption, including reasonableness and conservation; 2) utilization, including utilization of equipment and materials; and 3) storage and movement, including warehousing, and internal and external movement of the prop-

erty. R 913. Olin decides which property will be put in inventory, R 147-48, which property will be taken out of inventory, R 1157-58, and, generally, has some control over the property. R 819. The federal government does not run Olin's day-to-day operations. R 853.

There is no document similar to a shipping document that records any transfer of the property from Olin to the government, R 114, and none of the inventory tags used at the Plant identify the property as federal government property. R 939. Olin may reject the property which it purchases and, when it does so, the return form indicates that the returned property is from Olin. R 938. When Olin rejects property it prepares a shipping document and an Olin employee packages the property. R 1090, 1093. When property purchased by Olin is returned after it has been paid for, Olin can deduct the amount owed by the vendor on the rejected property from a subsequent Olin payment to the vendor. R 1094-95.

Olin made payments of Missouri sales and use taxes either to Missouri or to Olin's vendors between November, 1985 and April, 1988 and the government reimbursed Olin for the payments. R 773. These reimbursements were not required by the Contract if there was an exemption available to Olin under state law. R 745-47, ¶¶ 73, 76, 77. Olin made all the sales and use tax payments which the government alleges were paid. R 776. The federal government has not paid to Missouri any of the taxes at issue. R 794. The government has not presented any claim for refund to Missouri other than that made in the complaint in this cause. R 776. Prior to the commencement of this case, Olin filed an administrative cause of action in the State of Missouri claiming that its purchases of tangible personal property were excluded from taxation by Missouri because its purchases were for the purpose of resale to the government. R 974. The state proceeding is stayed pending the outcome of this case.

In denying Missouri's motion to dismiss on February 1, 1990 (A-37), the district court found that the federal government had standing to bring this action because it was required to reimburse Olin for the purchase price of the property it acquired (A-40), and that 28 U.S.C. § 1341 did not deny the court jurisdiction because this case did not involve the interpretation or application of state law or an exemption or privilege granted by Missouri. A-44-45. The district court did not discuss Missouri's contention that it should abstain from the case for reasons of comity and federalism. On October 26, 1990, the district court denied Missouri's motion for summary judgment and granted the federal government's motion for summary judgment. A-19. The court found that the case presented a question of first impression under Missouri law (A-28) and that the property Olin purchased was purchased for resale to the federal government, even though Olin retained an interest in the property which the court described as "de minimis and insufficient to hold that a resale did not occur." A-29. The district court modified its order on March 25, 1991. A-16. The Eighth Circuit, by a divided panel, affirmed the district court in part on September 16, 1992 (A-2), holding that it would be a "needless procedural exercise" to dismiss this case for want of standing (A-5) and finding that Olin purchases the property for resale to the federal government. A-8. Judge Wellford, in dissent, found that the federal government lacked standing. A-11. The Eighth Circuit remanded the case to the district court. A timely petition for rehearing or rehearing en banc was filed on September 29, 1992, and was denied on November 6, 1992. A-1.

REASONS FOR GRANTING THE WRIT

Before the Court is a case of extraordinary importance to the states because it directly and negatively impacts their fiscal integrity and, hence, their sovereignty. As more fully discussed below, the Court should grant a writ because the decision of the Eighth Circuit conflicts with the decisions of this Court and other circuit courts and fails to address the significant federalism issues raised in this case. Based on the prior decisions of this Court and as reflected in the opinion of Judge Wellford, the United States does not have standing to bring this suit. Even if standing were conceded, comity and federalism would require the federal courts to abstain from this case because it requires a resolution of a question of first impression under Missouri's revenue laws. Additionally, the Tax Injunction Act denied the federal courts jurisdiction in this case because the federal government was asserting Olin's, not its own, interest and was claiming an exclusion from tax based on state law. Furthermore, the Eighth Circuit misconstrued Missouri law and the district court introduced a new factor into Missouri tax law. Finally, there is no need to resort to federal common law in this case to provide the federal government a remedy because Missouri provided an adequate remedy to Olin and the federal government cannot establish the elements of its common law claims.

I.

THE DECISION OF THE EIGHTH CIRCUIT, THAT THE FEDERAL GOVERNMENT HAS STANDING HEREIN BECAUSE TO HOLD OTHERWISE WOULD BE ADMINISTRATIVELY INCONVENIENT AND WOULD BE A "NEEDLESS PROCEDURAL EXERCISE," IS IN ERROR BECAUSE IT CONFLICTS WITH DECISIONS OF THIS COURT HOLDING THAT STANDING IS A JURISDICTIONAL PREREQUISITE AND REQUIRING A PLAINTIFF TO ESTABLISH AN INJURY IN

FACT THAT IS FAIRLY TRACEABLE TO DEFENDANTS' ALLEGEDLY UNLAWFUL CONDUCT.

This Court has held that "standing 'is perhaps the most important of [the jurisdictional] doctrines.'" *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990), quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984). The Eighth Circuit opinion "does not directly address the issue [of standing] in its analysis." Wellford, J., dissenting, finding the government lacks standing; A-12. Rather, the majority opinion, without citation to authority, ruled that the action should be heard to avoid the "circuity of action" which would result if Olin were required to present its claim of tax exclusion and, assuming it were successful and refused to relinquish the refund, the United States were required to sue Olin for the refund. A-5. The Eighth Circuit ruled that it would be a "needless procedural exercise" to refuse to hear the case on standing grounds. A-5.

The Eighth Circuit's decision to ignore a mandatory jurisdictional prerequisite—simply because it would be administratively convenient to do so—is flatly inconsistent with the decisions of this Court. If not corrected, the Eighth Circuit's decision will graft a wholly unwarranted and unwise exception to the time-honored and constitutionally required principle of standing; the exception of "administrative convenience." This Court should grant review to ensure that a fundamental jurisdictional prerequisite is not so impaired. As Judge Wellford, in his dissent aptly observed, the government's position on standing is logically inconsistent.

> The United States bases its substantive claim on the theory that *Olin* was *exempt* from paying the sales and use taxes in the first instance. If Olin were exempt as the government contends, I would conclude that the United States is procedurally barred from bringing this suit for lack of standing because it had no contractual obligation to reimburse Olin for those payments. If Olin were *not* initially

> exempt from paying those taxes, then the United States would fail on the merits of its claim.

A-13, n. 2. If Olin was not required to pay Missouri sales and use taxes, the federal cannot demonstrate that it has been injured by Missouri's conduct and, hence, suffered no injury fairly traceable to Missouri. Consequently, the federal government lacks standing in this suit.

The federal government's contract with Olin incorporates by reference Federal Acquisition Regulation (FAR) 32.205-41. This regulation provides that state taxes are an allowable cost under the Contract unless

> exemptions are available to the contractor directly, or available to the contractor based on an exemption afforded the Government . . ..

FAR 32.205-41(b)(3).

> If no contractual agreement bound the United States to reimburse Olin for the taxes, then the United States has no basis on which to establish direct injury resulting from the actions of the State of Missouri, *i.e.*, standing, in this suit.

A-11, Wellford, J., dissenting.

Prior to the commencement of this case, Olin filed a state proceeding (which has been stayed pending this matter) to determine whether the exemption urged by the federal government here was available to Olin. If Olin was exempt from paying the taxes at issue, the taxes paid by Olin were not reimbursable costs under the contract. Therefore, the federal government was not required to reimburse Olin's payment of the taxes but did so voluntarily or mistakenly. In either event, the federal government cannot establish two requirements of standing: an "injury in fact" and an injury "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Lujan v.*

Defenders of Wildlife, ___ U.S. ___, 112 S.Ct. 2130, 2136 (1992). In this case, where the federal government was not contractually required to reimburse Olin's payment of taxes, the requirements of standing have not been met.

This Court should not allow the federal courts to exercise jurisdiction when the federal government cannot establish the requisites of standing. To permit a federal court to exercise jurisdiction in this matter constitutes an unwarranted and unwise expansion of federal court jurisdiction.

II.

A DUE REGARD FOR THE RETAINED SOVEREIGNTY OF THE STATES DICTATES THAT THE FEDERAL COURTS SHOULD HAVE ABSTAINED FROM DECIDING THE FEDERAL GOVERNMENT'S CLAIM THAT ITS CONTRACTOR WAS ENTITLED TO A STATE-CREATED EXCLUSION FROM STATE TAXATION.

It is critically important that States be accorded near unilateral power to construe their exclusions from taxation because of the impact such constructions have on their revenue. A federal court should not engage in the construction of exclusions from state taxation. Alexander Hamilton once said:

> [A]n attempt on the part of the national government to abridge them [the States] in the exercise of it [their independence and uncontrollable authority to raise their own revenues] would be a violent assumption of power, unwarranted by any article or clause of its Constitution.

The Federalist No. 32 (A. Hamilton). The rationale for such a rule is obvious; only if the States can control their own financial destiny can they effectively provide a balance to federal power. This Court does not fail to recognize this principle.

> [E]very school child learns, our Constitution establishes a system of dual sovereignty between States and the Federal Government.
>
> * * *
>
> These twin powers will act as mutual restraints only if both are credible.

Gregory v. Ashcroft, ___ U.S. ___, 111 S.Ct. 2395, 2399-400 (1991). This Court should review the decision of the Eighth Circuit because the district and circuit court wholly failed to address the issues of comity and federalism raised by Missouri and because these issues are of extraordinary importance.

In the case at bar the federal government has secured an injunction from a federal court resolving a question of first impression under Missouri's revenue collection system on the sole basis that the federal government has a contract with the private corporation that does business in Missouri. Thus, the federal government asserts the power to have resolved state taxation questions, which go to the heart of state sovereignty, whenever it arguably bears the economic impact of state taxation. To permit the federal government to exercise such power undermines and betrays the historically necessary function of the States to secure their own survival and, hence, to act as a balancing restraint on federal power.

The federal courts are free to abstain from deciding a party's claims for reasons of comity and respect for federalism. The Supreme Court has upheld,

> abstention on grounds of comity with the States when the exercise of jurisdiction by the federal court would disrupt a state administrative process . . ., interfere with the collection of state taxes . . ., or otherwise create needless friction by unnecessarily enjoining state officials from executing domestic policies.

Allegheny County v. Frank Mashuda Co., 360 U.S. 185, 189 (1959). In fact, the Court has recognized as "imperative" a State's "need . . . to administer its own fiscal operations." *Tulley v. Griffin, Inc.*, 429 U.S. 68, 73 (1976).

The Court has refined this abstention doctrine as follows:

> Where timely and adequate state court review is available, a federal court sitting in equity *must* decline to interfere with the proceedings of state administrative agencies: (1) when there are 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case at bar'; or (2) where the 'exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'

New Orleans Public Service, Inc. v. Council of City of New Orleans, 491 U.S. 350, 361 (1989) (emphasis added), quoting *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800 (1976). Furthermore, this Court has recognized that abstention based on comity and federalism concerns is not limited by the Tax Injunction Act:

> Neither the legislative history of the [Tax Injunction] Act nor that of its precursor . . . suggests that Congress intended that federal-court deference in state tax matters be limited to the actions enumerated in those sections . . .. Thus, the principle of comity which predated the Act was not restricted by its passage.

Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 110 (1981) (citations omitted).

The decision of the circuit court adversely impact the concerns discussed above. Missouri has established a simple and efficient manner for review of state sales tax issues. See §§ 144.190,

144.261, 144.696, and 621.050, RSMo. One simply files a claim for refund with the Administrative Hearing Commission and appeals adverse decisions to the Missouri Supreme Court. Section 621.189, RSMo, and Constitution of the State of Missouri, Art. V, § 3.

Under the *New Orleans* test, there can be little doubt that the federal government's sale for resale claim presents a difficult question of state law bearing on important public policy issues and that the exercise of federal jurisdiction disrupts state efforts to establish coherent tax policy. The district court determined that respondent's sale for resale claim presented a case of first impression under Missouri state tax law (A-28) and ultimately decided that any interest Olin retained in the property was de minimis and subservient to the government's interest. A-28-9. No discovered Missouri case has ever attempted to quantify the amount of retained interest a purchaser has in property in order to determine its taxability. A federal court's introduction of this issue into Missouri tax law and its exercise of jurisdiction over this case when Olin had already presented the resale claim to the Administrative Hearing Commission clearly disrupted Missouri's effort to establish coherent tax policy.

Missouri is aware that federal courts are hesitant to abstain from claims presented by the federal government. However, the federal government "should never have sought relief in the federal court" requesting a declaratory judgment that the tax was invalid because of a state exemption. *U.S. v. The City of New York*, 175 F.2d 75, 77 (2nd Cir.), *cert. denied*, 338 U.S. 885 (1949). In *New York* the federal government entered into an agreement to compensate a hospital association for the federal government's use of the hospital and to pay the taxes levied on the property. Thereafter, the federal government asked a federal court to declare invalid the taxes imposed on the hospital property by the City of New York on the ground that the property was exempt from tax under state law. The Second Circuit rejected the exercise of jurisdiction holding:

> The question of the validity of a state or municipal tax is one which the state courts are peculiarly fitted to answer and which, therefore, a federal court should not consider.

Id.

The federal government asserted below and the district court initially found that only by "interpreting and construing that [contractual] relationship [between Olin and the federal government] can the Court determine whether Missouri can lawfully require Olin to pay sales and use taxes . . .." A-44. However, no contractual language was used by the courts below to resolve the taxability of the transactions at issue and for good reason. A contract may contain a characterization of what the parties intended to do but it cannot describe, in a legally binding fashion on non-parties to the contract, what really happens subsequent to the contract's execution. It is the conduct of Olin, not a contractual characterization of its expected conduct, which must be evaluated under Missouri law to determine whether Olin's purchases are excluded from Missouri taxation. This conduct should be evaluated in a Missouri proceeding by those practiced in the construction of Missouri tax law to determine its effect. Any other conclusion leaves the construction of every state's tax exemptions in federal hands.

Under the circumstances presented here, where the district court admitted to deciding a question of first impression concerning Missouri's tax law and an exclusion from tax provided therein, the district court should have abstained from resolving the controversy in light of the principles of comity and federalism which underlie this country's system of government. Barring such a decision by the district court, the Eighth Circuit should have required such abstention.

III.

IT IS OF CONSIDERABLE IMPORTANCE THAT THIS COURT DETERMINE THE LIMITS ON FEDERAL COURT JURISDICTION WHEN THE UNITED STATES SEEKS TO ASSERT THE RIGHTS OF OTHERS IN LITIGATION THAT WOULD BE BARRED BY 28 U.S.C. § 1341 WERE IT NOT BROUGHT BY THE UNITED STATES.

The Tax Injunction Act (28 U.S.C. § 1341) provides that the district courts "shall not enjoin, suspend or restrain the . . . collection of any tax under State law" where the state provides an adequate remedy. This Court has held that the Act

> does not act as a restriction upon suits by the United States to *protect itself and its instrumentalities* from *unconstitutional* state exactions.

Department of Employment Security v. U.S., 385 U.S. 355, 358 (1966) (emphasis added). In the case before the Court, the United States does not seek to protect itself (because Missouri has not levied a tax on the United States) nor its instrumentality (because Olin is admittedly not an instrumentality of the federal government) from an allegedly unconstitutional tax. Rather, here the federal government seeks protection for Olin from a state tax on the basis of a state-law exclusion. Olin, not the federal government, is the real party in interest. The Tax Injunction Act applies to bar Olin's claim that its purchases are excluded from state tax even though the claim is presented here by the federal government.

In situations other than those where the federal government seeks to protect itself or its instrumentalities from unconstitutional state taxes, the circuit courts have expressed opinions indicating that § 1341 limits federal court jurisdiction to hear claims brought by the United States and, in one instance, this Court has affirmed such a holding. In *U.S. v. Livingston*, 179

F.Supp. 9 (E.D. S.C. 1959), *aff'd*, 364 U.S. 281 (1960), the court found that § 1341 did not bar the federal government's claim because the government sought to affirm its sovereign immunity from taxation. However, the court explained:

> Were the United States seeking to avail itself to an exemption or privilege granted by the state, we might, nevertheless, feel constrained to withhold action until the state courts decided the limits of the state's exclusionary grants.

179 F.Supp. at 12.

More recently, the Fourth Circuit faced a case where the district court resolved the federal government's supremacy clause claim by construing the state's taxing statute. The court noted:

> Perhaps, applying the anti-injunction statute, the case should have been remitted to the Montgomery County Circuit Court since . . . the tax was not levied on the United States.

U.S. v. Montgomery County, 761 F.2d 998, 1000 (4th Cir. 1985). The court did not do so "in order to spare the necessity for the parties to start this litigation all over again" because the federal government had presented solely a supremacy clause claim. *Id.* at 1001.

In the case at bar, the federal government has only presented a claim based on a state law exclusion from tax available to its contractor. Recently this Court rejected the claim of two foreign corporations who claimed that the Tax Injunction Act should not apply to them when they attempted to assert the nonapplicability of a tax on their subsidiaries in federal court because they could not bring a case in state court. The Court found § 1341 applicable because the parent corporations

> can direct in all respects their subsidiaries pursuit of state court relief . . . . We therefore, construe the Tax Injunction

> Act as barring a federal action by a party who has under its direction and control an entity possessing a plain speedy and efficient remedy for the controlling party's claims.

Franchise Tax Bd. of California v. Alcan Aluminum, 493 U.S. 331, 110 S.Ct. 661, 666 (1990). There is no dispute here that the federal government has the contractual right to "take charge of any litigation" involving Olin and arising out of the Contract. R 112.

Under these circumstances, where the federal government seeks only to avail itself of an exclusion from state taxation provided by state law, § 1341 should be construed to preclude jurisdiction of the government's claim particularly in light of its right to control Olin's litigation of that claim.

IV.

THE DECISION OF THE EIGHTH CIRCUIT, THAT OLIN'S PURCHASES OF TANGIBLE PERSONAL PROPERTY ARE EXCLUDED FROM SALES AND USE TAXES BECAUSE THEY ARE RESOLD TO THE FEDERAL GOVERNMENT, CONFLICTS WITH THE DECISION OF THE FOURTH CIRCUIT AND EXPANDS THE SCOPE OF MISSOURI'S EXCLUSION FROM TAX IN DEROGATION OF MISSOURI'S NEED TO CONTROL ITS OWN FISCAL DESTINY.

The federal government contends, and the courts below accepted, that third party sales of property to a federal contractor were excluded from tax because the contractor resold the property to the federal government despite the fact that the contractor purchased the property, paid for the property, received possession of the property and used the property to complete its contract function. In so deciding, the courts below substantially expanded the state-created exclusion from tax in apparent disregard for Missouri's need to control its own revenues and tax law. The

courts below also ignored the counsel of the only federal court which previously considered the issue and found that the contractual relationship between a federal contractor and the federal government was insufficient to conclude that a resale of property had occurred.

The State of Missouri imposes a sales tax upon retail sales. Section 144.020.1(1), RSMo. A sale at retail is defined as any transfer by a person engaged in business of the ownership of, or title to, tangible personal property to the purchaser for use or consumption and not for resale. Section 144.010.1(8), RSMo. The federal government contends that the personal property at issue has been resold to it because it reimburses Olin for the purchase price of the same, secures title directly from Olin's vendors at Olin's direction and, has the mostly unexercized power to divert the property from Olin's use in fulfilling its contractual obligations to other uses. The district court found that this case presented a question of first impression (A-28) and held that any interest Olin retained in the property was "de minimis and insufficient to hold that a resale did not occur." A-28-9.

It is, however, undisputed that Olin employs most of the property it purchases to fulfill its contractual obligations. The Missouri Supreme Court has held that

> materials purchased by a contractor for use in meeting contractual obligations . . . are used or consumed by the contractor; they are not resold.

Overland Steel, Inc. v. Director of Revenue, 647 S.W.2d 535 (Mo. banc 1983). Similarly, in *Odorite of America, Inc. v. Director of Revenue*, 713 S.W.2d 833 (Mo. banc 1986), the manufacturer and wholesaler of air deodorant machines and chemicals sold those products to distributors and contended that the distributors resold these products to the establishments where the services were performed. The Missouri Supreme Court, however, rejected the argument because the wholesaler

> sells products which are used and consumed by its distributors in the normal conduct and performance of their distributorship services.

Id. at 838. There is simply no dispute in this case that Olin used the products it purchased from its vendors to fulfill its contractual obligations to the federal government.

While Olin's use and consumption of the property is inconsistent with its alleged resale of the same to the federal government, it is apparent that such a resale did not occur. There is no evidence of a transfer, exchange or barter of the title or ownership of the property from Olin to the federal government. Initially, it must be remembered that Olin, in its purchase order, directs that its vendors transfer the title to the property directly to the federal government. While Olin clearly facilitates the transfer of title from its vendors to the federal government, Olin never has title to the property and thus, cannot transfer it. What Olin does receive from its vendors is the entire ownership interest in the property. It must also be remembered that Missouri taxes the transfer of either title or ownership unless the property is neither used nor consumed and is resold. Missouri has defined an "owner" as one "who has dominion or control over a thing." *State ex rel. Thompson-Stearns-Roger v. Schaffner*, 489 S.W.2d 207, 215 (Mo. 1973). Olin exercised control over the property which it purchased in performing its contractual obligations with the property. In fact, under the Contract with the federal government, Olin could be granted an award fee based upon the efficiency with which it used the property. While Olin exercised dominion and control over the property, there is no evidence that it ever transferred this control to the federal government. In reality, Olin never relinquished its control over the property because that control was necessary to operate and maintain the Plant.

The courts below mistakenly relied on *Canteen Corp. v. Goldberg*, 592 S.W.2d 754 (Mo. banc 1980). In the *Canteen* case, Canteen rented and operated a dining facility in the Council Plaza Retirement Home. Canteen served meals to the residents

of the retirement home and billed Council Plaza for the meals served. Council Plaza was obligated to pay Canteen for the meals even if it was unable to collect on the bills for the meals it subsequently submitted to the residents. The Missouri Supreme Court found that two transactions had occurred. A sale from Canteen to Council Plaza and a resale from Council Plaza to its residents. Consequently, the Missouri court found no sale at retail between Canteen and Council Plaza.

Canteen, however, cannot be considered analogous to the case at bar. There is no discussion in the *Canteen* case of a distinction between the transfer of title and of ownership. The Missouri Supreme Court could not have concluded that Canteen transferred to Council Plaza the ownership interest (dominion or control) in the meals which Canteen physically served to the retirement home's residents. Rather, Canteen retained this possessory, ownership interest until it served the residents. What Canteen did transfer to Council Plaza was the bare legal title to the meals and the Missouri Supreme Court found that this legal title was transferred from Council Plaza to its residents. Consequently, the transfer of title from Canteen to Council Plaza was a non-taxable event because this title was transferred a second time by Council Plaza to its residents.[2] However, the Missouri Supreme Court did not conclude that the transfer of ownership from Canteen to the home's residents was a non-taxable transfer of ownership. Rather, this issue, which is comparable to the physical transfer of property from Olin's vendors to Olin, and the dual nature of Missouri's imposition of sales tax were simply not addressed in the *Canteen* case.

The analysis set forth above, that Olin used and consumed the property at issue to fulfill its contractual obligations and did not

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[2] Missouri does not contend that the transfer of title from Olin's vendors to the federal government is a taxable event. Rather, Missouri finds that the transfer of ownership from Olin's vendors to Olin is a taxable event.

resell the same to the federal government, is not only compelled by Missouri law, it is the analysis undertaken of the federal government's similar claim in the Fourth Circuit. There, in a case involving identical contract language, the district court found, despite the transfer of title to the federal government and the government's reimbursement of the purchase price to the contractor, that the property

> was purchased by [the contractor] for its consumption in the performance of its contract with the United States to manufacture military propellants and explosives. We cannot say that any of these items were "resold" to the United States.

U.S. v. Forst, 442 F.Supp. 920, 925 (W.D. Va. 1977), *aff'd*, 569 F.2d 811 (4th Cir. 1978). The Fourth Circuit affirmed the "well reasoned opinion" of the district court. 569 F.2d at 812.

V.

THIS COURT SHOULD DECIDE WHETHER THE FEDERAL GOVERNMENT CAN BRING A QUASI CONTRACT OR INDEBITATUS ASSUMPSIT CLAIM AGAINST A STATE FOR TAXES COLLECTED FROM THIRD PARTIES AND, IF SO, THE ELEMENTS OF SUCH A CLAIM AND THE PROOF REQUIRED CONSIDERING THE SIGNIFICANCE OF THIS ISSUE TO THE STATES AND THE FACT THAT THIS COURT HAS GRANTED CERTIORARI IN A SIMILAR CASE.

U.S. v. California, 932 F.2d 1346 (9th Cir. 1991), *cert. granted*, __ U.S. __, 113 S.Ct. 50 (1992) concerns the government's claim for restitution, under a quasi contract theory, of sales and use taxes paid by a federal contractor to California and subsequently reimbursed by the federal government. The district court granted California's motion for summary judgment and the federal government sought review. In neither *California* nor this case does the federal government rely on sovereign

immunity to challenge the tax. Rather, in both cases, the federal government claims that the respective states' tax laws have no application to its contractor because of the nature and terms of the contract between the federal government and its contractor.

The Ninth Circuit sustained the district court's rejection of the federal government's common law quasi contract claim. Initially, the court noted that the application of federal common law was unnecessary because the government had no federal interest which conflicted with the application of state law to the government's claim that the items purchased by the contractor were not subject to tax. Next the court determined that there was not a clear body of federal common law concerning the quasi contract theory and proceeded to distinguish the cases cited by the district court in the case at bar from the type of claim the federal government sought to present here and in the *California* case. The court stated:

> At the heart of an action based on quasi contract lies a claim of unjust enrichment and such quasi contract liability is dictated by the needs of justice and fairness. . . . No such facts exist in this case.
>
> * * *
>
> This case does not involve classic unjust enrichment such as a simple overpayment. Instead, the United States' unjust enrichment argument is posited upon the interpretation of a state-created exemption from a state created sales tax.

Id. at 1350. Ultimately the court concluded that the United States was required to comply with state law claim filing procedures before it could file a refund action.

Furthermore, if the federal government wishes to bring a common law cause of action it must establish the elements of its claim. In the case at bar, the government cannot state a valid

claim against Missouri in quasi contract or indebitatus assumpsit. The essential elements of quasi contract are:

> (1) [T]he receipt of a benefit by the defendant *from the plaintiff*, . . . (2) which benefit it is inequitable that the defendant retain.

Atlas Concrete Pipe, Inc. v. Roger J. Au & Son, Inc., 467 F.Supp. 830, 839 (E.D. Mich. 1979) (emphasis added), *rev'd on other grounds*, 668 F.2d 905 (6th Cir. 1982). See also *Marine Design, Inc. v. Zigler Shipyards*, 791 F.2d 375, 378 (5th Cir. 1986) (quasi contract under Louisiana law requires "a benefit conferred on the defendant by the plaintiff"); *Matter of Fasano/Harriss Pie Co.*, 43 B.R. 864, 869 (W.D. Mich. 1984) (an essential element of quasi contract is "a benefit conferred on the defendant by the plaintiff").

The evidence in this case is undisputed. Any money Missouri received was received from Olin's vendors or from Olin, not from the government. The government has made none of the payments at issue. All it has done is voluntarily reimburse Olin for tax payments made by Olin. Under these circumstances the federal government fails to meet the first element required for quasi contractual relief; it cannot establish Missouri's receipt of a benefit from the government.

The federal government also alleged that its claim is brought on the theory of indebitatus assumpsit. There are few cases which state the elements of this type of claim. However, in such a claim the burden is on the plaintiff to show that it conferred a benefit upon the defendant. *Ruse v. Williams*, 14 Ariz. 445, 130 P. 887, 888 (1913). As stated above, the federal government has conferred no benefit on Missouri. Furthermore, assumpsit arises from a promise implied by law on the defendant. However, the law "never implies a promise to do an act . . . contrary to law." *Bailey v. New York Cent. & R. Co.*, 89 U.S. (22 Wall.) 604, 639, 22 L.Ed. 840 (1874).

The promise the federal government seeks to imply on Missouri violates Missouri law. Missouri law prohibits the return of collected taxes to one who was not legally obligated to remit the same (144.190.2, RSMo) and to one who failed to properly present a claim for refund in a timely fashion. Section 144.190.3, RSMo. The federal government did not submit a claim to Missouri as required by state law. Furthermore, the entity under Missouri tax law who is required to remit sales taxes under the statutorily referenced sections is the seller of tangible personal property; Olin's vendor or, if Olin has submitted to the vendor an exemption certificate, Olin. The federal government is not such an entity and is not the proper party to receive a refund.

The Missouri Supreme Court has considered the validity of refund claims not presented in accordance with statutory requirements and has said:

> [O]n the grounds of public policy, the law discourages suits for the purpose of recovering taxes alleged to have been illegally levied and collected; and it is for this reason of policy that the remedy of a refund . . . is the exclusive remedy.

Charles v. Spradling, 524 S.W.2d 820, 823 (Mo. banc 1975). The federal government simply cannot ignore the burden of Missouri's tax law while claiming the benefit of an exclusion created by state law.

Even if Missouri were to concede for the sake of argument that the federal government was a proper party to make a claim for refund and that it had properly presented its claim, the federal government would still be procedurally barred from receiving at least a portion of its claimed refund because of Missouri's three-year statute of limitations. Section 144.190.2, RSMo. It would be inappropriate to impose on Missouri a promise which ignores all the laws Missouri has enacted with regard to the refund of

collected taxes. For these reasons, the federal government's indebitatus assumpsit claim should be rejected.

As stated above, this case presents issues of substantial importance to the States and their treasuries. The federal government should not be allowed to bring claims for refunds of monies received by states from third parties pursuant to the theories of quasi contract and indebitatus assumpsit. This Court has twice advised the federal government that if it wishes to immunize its contractors from state taxes, it must resort to the legislative branch. *U.S. v. New Mexico,* 455 U.S. 720, 744 (1982); *U.S. v. City of Detroit,* 355 U.S. 466, 474 (1958). To avoid these admonitions, the federal government seeks to rely on two common law theories and litigate state taxation issues in federal court. The federal government cannot be allowed to require a state who is the ultimate holder of a private entity's funds to disgorge them based on a state-created benefit (the tax exclusion) without following the state's procedures. This is particularly true when the federal government cannot establish the elements of the common law theories it seeks to rely upon. Any other result leaves the state treasuries of this nation subject to only the self-regulated reach of the federal government. Such a result provides the federal government a mechanism to eliminate the effectiveness of the states as a balancing sovereign force; surely not a result the creators of our federal system would tolerate.

CONCLUSION

Petitioners urge this Court to clarify the issues presented in this case and respectfully request this Court to grant a writ of certiorari.

Respectfully submitted,

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-2206WMKC

United States of America,

Appellee,

v.

Duane Benton, Director of Revenue, State of Missouri;
Missouri Department of Revenue; State of Missouri.

Appellant.

Order Denying Petition for Rehearing and
Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

November 6, 1991

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-2206WM

United States of America,

Appellee,

v.

Duane Benton, Director of Revenue, State of Missouri; Missouri Department of Revenue; State of Missouri.

Appellants.

On Appeal from the United States District Court
for the Western District of Missouri

Submitted: January 9, 1992
Filed: September 16, 1992

Before RICHARD S. ARNOLD, Chief Judge, McMILLIAN, Circuit Judge, and WELLFORD,* Senior Circuit Judge.

RICHARD S. ARNOLD, Chief Judge.

This case involves the disputed payment of Missouri sales and use taxes by a federal contractor, the Olin Corporation. The United States argues that the taxed purchases involved materials which Olin resold to the government. In Missouri, the sales tax applies to sales for retail, a category that does not include sales for resale. As a result, the government argues, these purchases were wrongly taxed, and the United States is entitled to a refund. Missouri contends that these transactions were properly taxable.

The District Court agreed with the United States, holding that it was entitled to a refund of $683,631.26. The Court also

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* The Hon. Harry W. Wellford, Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

awarded the United States prejudgment interest on this amount. *United States v. Benton*, No. 89-0608-CV-W-3, slip op. 3 (W.D. Mo. Mar. 25, 1991). Missouri now appeals, raising several procedural and substantive arguments for reversal. After *de novo* review, as required by *Salve Regina College v. Russell*, 111 S. Ct. 1217 (1991), we affirm in part and reverse in part.

I.

The facts of this case are uncomplicated. Olin entered into a contract with the United States to operate the Lake City Ammunition Plant in Independence, Missouri. Since November 3, 1985, Olin has operated and maintained the plant under the terms of this contract. The contract requires that Olin purchase the products and materials it needs to perform its contract function, manufacturing ammunition. While Olin does not have to gain the approval of the government when it makes these purchases, it is required to report to the government, and the majority of its tasks are expressly subject to the direction or approval of an Army contracting officer.

Under the terms of the contract, Olin has the freedom to choose the vendors it would like to do business with. It is not required to solicit bids and choose the lowest bidder. The items that Olin orders are shipped directly to the plant in Independence, with the direction that title is to pass to the United States upon delivery at the plant. Appendix 691, ¶ 9. Olin pays for these purchases with its own money and is then reimbursed by the United States under the terms of the contract. These reimbursements have included the sales and use taxes paid by Olin on these purchases.

II.

Prior to reaching the merits of this appeal, we must confront several procedural claims raised by Missouri. It alleges that the federal courts should not consider the government's claims

because (1) federal jurisdiction is prohibited under the Tax Injunction Act, 28 U.S.C. § 1341; (2) the federal government did not have standing to bring this claim; and (3) principles of comity and federalism should cause the federal courts to abstain from hearing this case. We reject these arguments. Only the first and second merit any discussion.

The Tax Injunction Act states:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1341. Missouri contends that the Act bars this action by the United States. It argues that the government is merely standing in the shoes of Olin, and that this case is concerned solely with the determination of state tax-law issues. As a result, it argues that this case properly belongs in the state courts.

At the heart of this dispute lies the contractual relationship between the United States and Olin. To determine whether the transfers between the original vendors and Olin, and the subsequent transfers by Olin to the United States amounted to a "sale for resale" under Mo. Rev. Stat. § 144.010.1(8) (1986), the contract between Olin and the government must be examined. The interpretation of a contract between the United States and another party depends on federal law. *United States v. Jackson County, Missouri*, 696 F. Supp. 479, 484 (W.D. Mo. 1988). In such a situation, the Tax Injunction Act does not bar the United States from seeking a resolution of this federal question in a federal forum. See *United States v. Broward County, Florida*, 901 F.2d 1005, 1008 (11th Cir. 1990) ("Section 1341 does not bar a suit brought by the United States to recover taxes improperly exacted from a contractor performing a federal contract

when the United States has paid the State taxes pursuant to its contract with the federal contractor.").[1]

The State argues that the standing of the United States to bring this action is barred by the very terms of the contract with the Olin Corporation. Under the contract, the government was not obligated to reimburse Olin for payments made by Olin to the State that were not properly due because of an exemption from taxes. Here, the whole substantive point of the government's suit is that the transactions in question were exempt. Therefore, the argument runs, the government lacks standing to bring the suit. It should have been brought by Olin. In this event, though, Olin would, by hypothesis, win the case, and Olin would then, presumably voluntarily, turn over the funds to the government, which, in any event, would have an action against Olin to recover them if necessary. We see no reason why such a circuity of action should be required. Permitting the government to bring this case means that the money ends up in the right place, back with the government, after only one lawsuit, instead of two. No substantive rights are violated. To dismiss this case for lack of standing, accordingly, seems to us a needless procedural exercise. We hold that the United States does have standing, and we now turn to the merits.

III.

The primary issue in this appeal is whether the transactions between the vendors, Olin, and the government, were properly

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[1] We also reject Missouri's contention that the Ninth Circuit's opinion in *United States v. California*, 932 F.2d 1346 (9th Cir. 1991), *petition for cert. filed*, No. 91-2003 (U.S. June 12, 1992), divests us of jurisdiction in this case. *California* may be distinguishable, but even if it isn't, we find more persuasive the reasoning of *United States v. Broward County, Florida*, 901 F.2d 1005 (11th Cir. 1990), which allowed the United States to proceed as the proper party in an action in quasi-contract for money had and received in a situation where a federal contractor had been improperly assessed state taxes.

taxable as a "sale at retail" under the Missouri tax code. Mo. Rev. Stat. § 144.020.1 (1986), levies a tax

> upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state.

A "sale at retail" has been defined by the legislature as "any transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration . . .. *Id.* at § 144.010.1(8) (1986). Thus, a "sale at retail" is a transfer for use or consumption which is "not for resale."

The government argues that the materials purchased by Olin were subsequently resold to the United States. It argues that upon receipt from the vendors, Olin immediately transfers title to the United States. This transfer of title, the government posits, renders the initial transfer between the vendors and Olin non-taxable as a sale for resale under § 144.010.1(8). Missouri responds that there is no sale for resale, that the only taxable transaction occurs between the vendors and Olin, and that, although title to the goods passes from Olin to the United States upon delivery, Olin still retains a significant ownership interest in the goods while it uses them to perform under the contract. We hold that Olin did resell the disputed materials to the United States, and thus the initial transaction between the vendors and Olin was not a sale at retail and not taxable.

Under Missouri law, the sales tax is paid by the purchaser of the goods. *State ex rel. Thompson-Stearns-Roger v. Schaffner*, 489 S.W.2d 207, 215 (Mo. 1973); Mo. Rev. Stat. § 144.060 (1986). The Supreme Court has determined that a "purchaser" is the person who orders the goods and either pays for them or is legally obligated to pay for them. *Alabama v. King & Boozer*, 314 U.S. 1, 10 (1941). In this case, there is no dispute that Olin

was a purchaser of the goods it ordered from the vendors. Our analysis focuses on whether those transactions were final for sales-tax purposes, or whether Olin turned around and resold the goods to the United States. Under the contract between Olin and the United States, the government is required to reimburse Olin for its purchases. Appendix 688, 773. We think this is sufficient to indicate that a resale has taken place.

The Lake City Ammunition Plant is owned by the United States. Olin was hired by the Department of the Army to operate and maintain the plant. It is not an agent of the government, but is instead an independent contractor. Under the terms of its contract, Olin must furnish the equipment, supplies, and materials needed to operate and maintain the plant. To do this, Olin may go out and contract with individual vendors to purchase the materials it needs. It does not need the approval of the United States to pick any specific vendor. However, on the purchase orders, the vendors are informed that title to the goods which Olin purchases is to pass to the United States upon their delivery to the plant. Furthermore, under the terms of the contract, the government is required to reimburse Olin for all purchases of personal property needed for the operation of the plant. After delivery of the items to the plant and payment for the items by Olin, the government reimburses Olin for all of these expenses. The government argues that these facts show a seller/buyer relationship between Olin and the government.

The State argues that despite the transfer of title to the United States, Olin retains an ownership interest in the property because it has dominion and control over it. But whatever interest Olin has in the property, if any, does not prevent the United States from receiving title to the goods. For instance, upon delivery to the plant, the United States is clearly given the power to direct that the goods be shifted to other plants or other projects. It has exercised this power in the past, and Olin is in no position to prevent such a transfer. Furthermore, under the Missouri Department of Revenue's Rule No. 28, "[t]he power to designate who

is to obtain title to the property or to physically transfer the property is enough to categorize the person as a seller of the property." 12 C.S.R. 10-3.012(3). This is exactly the position that Olin occupies in this case.

The facts in this case are analogous to those confronted by the Supreme Court of Missouri in *Canteen Corporation v. Goldberg*, 592 S.W.2d 754 (Mo. 1980). In that case, Canteen operated a dining facility for residents of the Council Plaza Retirement Home. *Id.* at 756. Under its contract with Council Plaza, Canteen would bill Council Plaza for the number of meals served per month. Council Plaza, in turn, would bill the residents for the meals that they received. Under the terms of the contract, however, Council Plaza was legally obligated to pay Canteen for the meals regardless of whether or not it received payment. *Id.* The Court found that these transactions amounted to a sale for resale. Initially Canteen would sell the meals to Council Plaza. Council Plaza would then turn around and resell these same meals to the retirement-home residents. The Missouri Supreme Court found that this was not a sale at retail, and thus sales tax could not be imposed.

In this case, the process is similar. Olin contracts with the vendors to purchase goods for the project. Upon receipt of these goods, Olin resells them to the United States, which is obligated under the terms of the contract to pay for them. Under Missouri law, no sales tax will be imposed if the sale is for resale "in any form." Section 144.010.1(8). While these transactions are not a typical resale, we conclude that the passage of title to the United States in exchange for the reimbursement of the purchase price amounts to a resale under Missouri law. Thus, the District Court did not err when it held that the transactions in this case were not subject to sales tax.[2]

[2] Under Missouri law, if items are exempted from sales tax, they are also exempted from use tax. Mo. Rev. Stat. § 144.615(6) (1986). Therefore, in the present case, Missouri is not entitled to any use taxes.

IV.

The final issue is whether the government is entitled to prejudgment interest on the amount to be refunded from Missouri.[3] The District Court awarded the government interest, holding that the amount should be calculated using Mo. Rev. Stat. §§ 32.065 and 144.190 (1986). Missouri argues that this was error for two reasons: (1) the United States is not entitled to prejudgment interest on debts owed to it by the States, based upon 31 U.S.C. §§ 3701(c) and 3717, and (2) if the United States is entitled to interest, the District Court erred in applying §§ 32.065 and 144.190 and in not fixing a date when the interest began to accrue. As we agree with the first argument, we decline to address the second.

The Debt Collection Act of 1982, 31 U.S.C. § 3701 *et seq.*, "provides for interest against 'persons' who owe past due debts to the United States." *Texas v. United States*, 951 F.2d 645, 649 (5th Cir.), *petition for cert. filed*, No. 91-1729 (U.S. April 27, 1992). Section 3701(c) of the Act excludes an agency of a state government from the definition of the term "person" in § 3717. The question here is whether this Act abrogated the common-law rule allowing the federal government to collect interest from Missouri in this case. We hold that it did.

Before the enactment of the Debt Collection Act, the United States had the right, under federal common law, to receive interest on debts owed to it by the States. See *West Virginia v. United States*, 479 U.S. 305 (1987); *Rodgers v. United States*, 332 U.S. 371 (1947). Since the Act was enacted, several circuits have addressed its effect on the common-law right to receive interest from the States. The majority has held that this right no

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[3] Missouri also argues that the District Court erred in allowing the government to present "surprise evidence" relating to the amount of taxes paid. This argument is without merit.

longer exists absent specific statutory language to the contrary. See *Arkansas by Scott v. Block*, 825 F.2d 1254 (8th Cir. 1987); *Perales v. United States*, 598 F. Supp. 19 (S.D.N.Y.), *aff'd*, 751 F.2d 95 (2d Cir. 1984) (per curiam); *Pennsylvania v. United States*, 781 F.2d 334 (3d Cir. 1986); *Texas*, *supra*. Only the Tenth Circuit has held to the contrary. *Gallegos v. Lyng*, 891 F.2d 788 (10th Cir. 1989). The Eleventh Circuit has avoided this question. See *Florida Department of Labor v. United States Department of Labor*, 893 F.2d 1319 (11th Cir.), *cert. denied*, 111 S. Ct. 49 (1990).

While this issue has stirred up much controversy, we are bound by our panel's decision in *Arkansas by Scott*. "By enacting a statute that explicitly denies the federal government authority to charge interest on debts owed it by the states, Congress abrogated any pre-existing common law right." *Arkansas by Scott*, 825 F.2d at 1258. We have been directed to no subsequent development that would persuade us to hold otherwise. Thus, we hold that the District Court erred in awarding prejudgment interest to the United States.

The judgment of the District Court is affirmed in part and reversed in part. The cause is remanded to that Court with instructions to enter a new judgment in accordance with this opinion.

It is so ordered.

WELLFORD, Senior Circuit Judge, dissenting.

One of the clauses in the contract between the United States and Olin relates to "allowable cost and payment." *See* Contract Part II - Section I, ¶ 2, clause 14 (incorporating Federal Acquisition Regulation ("FAR") 52.215-7 (APR 1984)). The contract incorporates FAR 32.205-41 by reference, which provides in pertinent part:

> (a) The following types of costs are allowable:
>
> (1) Federal, State, and local taxes (see part 29), except as otherwise provided in paragraph (b) below that are required to be and are paid or accrued in accordance with generally accepted accounting principles.
>
> . . .
>
> (b) The following types of costs are *not* allowable:
>
> . . .
>
> (3) *Taxes from which exemptions are available to the contractor directly*, or available to the contractor based on an exemption afforded the Government . . . . The term *Exemption* means freedom from taxation in whole or in part and includes a tax abatement or reduction resulting from mode of assessment, method of calculation, or otherwise.

(emphasis added). Therefore, assuming that Olin initially was exempt from paying the taxes at issue as the government now contends, such taxes *paid by Olin* to the State of Missouri were *not* reimbursable or "allowable" costs under the contract.[1] If no contractual agreement bound the United States to reimburse Olin for the taxes, then the United States has no basis on which to establish direct injury resulting from the actions of the State of Missouri, *i.e.* standing, in this suit. I, therefore, find the decision of the district court to be in error.

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[1] It is fairly clear that the United States claims that it is exempt from taxation because the goods sold to Olin were not "sales at retail" under Mo. Rev. Stat. § 144.020.1 (1986). The government does not claim that the tax imposed in this case was unconstitutionally discriminatory or unconstitutional as applied. The tangled issue of whether sovereign immunity extends to contractors who supply the government is, therefore, not reached in this case. For a discussion of that difficult issue, see *United States v. New Mexico*, 455 U.S. 720 (1981).

The majority raises the issue of standing as one of the two procedural claims that warrants discussion, but it does not directly address the issue in its analysis. Further, it does not acknowledge the error in the district court's reasoning with regard to standing. The district court adhered to its earlier finding, published at 729 F. Supp. 671, that the United States had properly established standing. That finding reads in pertinent part:

> [The United States] counters that it has suffered a direct pecuniary injury as a result of the imposition of Missouri sales and use taxes on Olin, because "[a]ny sales and use taxes assessed or imposed under Missouri law on Olin in its performance of the Contract have in the past and would be in the future paid from the funds of the United States in accordance with the provisions of the Contract." Plaintiff's Complaint § 15. The contract requires the federal government to reimburse Olin for all *purchases* of tangible personal property made pursuant to the contract.
>
> * * *
>
> The Court finds that the United States has alleged actual direct pecuniary injury *resulting from its obligation to reimburse Olin for purchases of personal property made pursuant to the contract*. . . . Accordingly, the Court finds that the United States has standing to assert jurisdiction and is a proper party to bring this action.

United States v. Benton, 729 F. Supp. 671, 673 (W.D. Mo. 1990) (emphasis added). In sum, the district court found that standing was established based on the government's contractual obligation to reimburse Olin. As explained above, however, the government was under no contractual obligation to reimburse Olin for those disbursements if Olin was initially exempt from paying

those taxes.[2] Thus, absent a contractual obligation to Olin, in my view the government has no basis on which to establish standing. That the government may have erroneously allowed and repaid the taxes does not, in my view, give the United States standing to correct the situation by seeking a refund directly from the State of Missouri.[3]

In addition, the cases on which the district court relied are distinguishable from the instant case. *See United States v. DeKalb County*, 729 F.2d 738 (11th Cir. 1984); and *United*

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[2] The United States bases its substantive claim on the theory that *Olin* was *exempt* from paying the sales and use taxes in the first instance. If Olin were exempt as the government contends, I would conclude that the United States is procedurally barred from bringing this suit for lack of standing because it had no contractual obligation to reimburse Olin for those payments. If Olin were *not* initially exempt from paying those taxes, then the United States would fail on the merits of its claim. In reaching my ultimate conclusion, I assume, without deciding, that Olin was exempt from paying the taxes at issue.

If I were to reach the merits of the government's claim, however, I would agree with the majority that under these particular circumstances, there was a resale of personal property from Olin to the United States. *See Canteen Corporation v. Goldberg*, 592 S.W.2d 754 (Mo. 1980). It is noteworthy that Canteen Corporation, who occupied the analogous position of Olin in this case, sued for the refund in that controversy.

[3] The United States might appropriately seek a refund from Olin, but Olin is the proper party to seek recourse, at its own expense, from the State of Missouri. As a practical and public policy matter, this conclusion reaches the better result. In freeing the United States from paying taxes from which Olin is exempt, the contract implicitly places the burden on Olin to recover any taxes that it might erroneously pay to the state. If the government could proceed as the plaintiff in suits such as this, there would be no incentive for federal contractors in Olin's position to challenge the taxes. Certainly this result was not intended by the contract.

States v. Virginia, 500 F. Supp. 729 (E.D. Va. 1980).[4] Those cases involved suits by the United States to recover taxes from state government, which taxes were paid by the United States indirectly through reimbursement pursuant to contractual obligations. In each case, the court found that the United States had standing to sue based on its contractual obligation to pay the taxes. *DeKalb*, 729 F.2d at 740 (the contract provided that the U.S. "would be responsible for all property taxes assessed against Bankers Life in connection with the property during the aforementioned term."); *Virginia*, 500 F. Supp. at 731 ("[T]he United States has a direct interest in this controversy because of its obligations under its cost-reimbursement contract."). In the case at bar, the United States was under no such contractual obligation, assuming that Olin is directly exempt from the taxes at issue. Therefore, the cases relied on by the district court are inapposite.

Under this suggested rationale, I find it immaterial that, as stated by the majority, "under the contract between Olin and the United States, the government is required to reimburse Olin for its *purchases*." (emphasis added). That may be so, but the government is not contractually required to reimburse Olin for sales and use taxes mistakenly paid by Olin on those purchases.

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[4] The court also cited *United States v. Nevada Tax Comm'n*, 439 F.2d 435 (9th Cir. 1971), but that case is inapplicable here. In *Nevada Tax Comm'n*, the United States was asserting its sovereign immunity from state taxation. The court held that the United States had standing because "'[t]he action . . . is essentially to establish the right of the [U.S.] and those with whom it deals to be relieved from an unconstitutionally discriminatory tax and to assert the constitutional immunity of the [U.S.] from taxation by the state.'" *Nevada Tax Comm'n*, 439 F.2d at 438-439 (quoting *United States v. Bureau of Revenue of New Mexico*, 291 F.2d 677, 678-679 (10th Cir. 1961); *see also Marquardt Corp. v. Weber County*, 360 F.2d 168 (10th Cir. 1966) (when United States claimed sovereign immunity, court found that "upon payment of the tax pursuant to its contractual obligation, the government became the real party in interest . . . ."); *see generally supra* note 1.

I need not consider the applicability of the Tax Injunction Act in the absence of standing. Also, in the absence of standing, I need not reach the prejudgment interest issue.

I would reverse and respectfully dissent.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 89-0608-CV-W-3

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DUANE BENTON, Director of Revenue, State of Missouri;
MISSOURI DEPARTMENT OF REVENUE;
and STATE OF MISSOURI,
Defendants.

ORDER

[Filed: March 25, 1991]

This Court previously granted summary judgment in favor of Plaintiff with its October 26, 1990 Order. Before the Court is Plaintiff's Motion to Alter or Amend Judgment pursuant to Fed. R. Civ. P. 59(e) and Defendants' Motion for Reconsideration, and the parties' responses and replies to said motions. Defendants reiterate the same arguments in its motion to reconsider, and to the extent Defendants raise new arguments, they are without merit. Plaintiff moves the Court to alter or amend its judgment for two reasons: (1) in the interests of intergovernmental harmony and in light of new evidence, to correct the amount of remedial relief sought in the complaint and awarded by the Court in its October 26, 1990 judgment; and (2) to clarify the judgment of the Court as to the terms of the injunction entered and the precise amount of remedial relief ordered, including the existence and extent of prejudgment interest.

An issue does arise as to whether the United States is entitled to prejudgment interest, as requested in its complaint. The

Supreme Court has held that the United States is entitled to prejudgment interest on the debt arising from the contractual obligation to reimburse the United States for disaster relief. *West Virginia v. United States*, 479 U.S. 305 (1987). The Court stated that "[n]o state policy compels any deviation from the longstanding rule that parties owing debts to the Federal Government must pay prejudgment interest where the underlying claim is a contractual obligation to pay money," and that "[p]rejudgment interest is an element of complete compensation." *Id.* at 310. The amount of prejudgment interest is to be left to the discretion of the trial court. *See Royal Indemnity Co. v. United States*, 313 U.S. 289, 296 (1941).

Pursuant to Mo. Rev. Code, Section 144.190, when Missouri sales tax has been erroneously or illegally collected, the amount is refunded to the taxpayer with interest as determined by Mo. Rev. Code § 32.065. Subsequent to September 1, 1986, the same rate is to apply to Missouri use tax refunds. *See* 1986 Mo. Laws 582 *et seq.* Thus, the interest rate calculated pursuant to Mo. Rev. Code § 32.065, is the interest rate this Court elects to impose on the defendants.

Accordingly, it is hereby ORDERED that the judgment entered on October 26, 1990 is amended and altered as follows:

Defendants, their successors in office, their employees, agents, attorneys, and all persons acting in concert with them who shall receive notice thereof are hereby enjoined from levying, assessing, imposing or collecting Missouri sales or use taxes on purchases of tangible personal property made by Olin Corporation under the terms of its contract with the United States Department of the Army for the operation of the Lake City Army Ammunition Plant in Independence, Missouri.

Defendants are further ORDERED to pay to the United States of America the sum of $683,631.26, representing the sum of all payments of sales and use taxes made to Defendants by Olin

Corporation upon purchases of tangible personal property for the operation of the Lake City Army Ammunition Plant. It is further ORDERED that Defendants are to pay prejudgment interest pursuant to Mo. Rev. Code §§ 32.065 and 144.190. IT IS SO ORDERED.

/s/Elmo B. Hunter
SENIOR U.S. DISTRICT JUDGE

DATED: 3-25-91

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 89-0608-CV-W-3

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DUANE BENTON, Director of Revenue, State of Missouri;
MISSOURI DEPARTMENT OF REVENUE;
and STATE OF MISSOURI,
Defendants.

MEMORANDUM OPINION AND ORDER

[Filed: October 26, 1990]

Before the Court are Plaintiff's and Defendants' motions for summary judgment. Fed. R. Civ. P. 56(c) states that a motion for summary judgment shall be rendered if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. A moving party for summary judgment must "establish the right to judgment with such clarity that there is no room for controversy." *Buford v. Tremayne*, 747 F.2d 445, 447 (8th Cir. 1984). The material facts in this case are undisputed. In its complaint, the U.S. seeks:

> a] a declaratory judgment that the State of Missouri is prohibited from imposing Missouri sales and use taxes on purchases of tangible personal property by Olin Corporation, a contractor of the United States, for the operation of the Lake City Army Ammunition Plant because the purchases were for the purpose of resale to the United States and are not subject to Missouri sales and use taxes:

b] injunctive relief prohibiting the defendants and all those acting in concert with them from imposing or collecting Missouri sales and use taxes on the sale and use of property purchased by Olin for the operation of the Plant; and

c] a refund of sales and use taxes paid by Olin on its purchases of tangible personal property for the operation of the Plant.

Defendants previously filed two motions to dismiss. Both were denied. The U.S. contends Olin is exempt from sales and use taxes because it is the operator of a U.S. owned munitions plant and the property is purchased for resale to the United States Army.

The plant is a government owned manufacturing facility located in Independence, Missouri, and manufactures ammunition for the U.S. and its allies. Since November 3, 1985, the plant has been operated and maintained by Olin pursuant to the terms of its contract with the Army. Olin is an independent contractor charged with the operation management and maintenance of the plant as the Army directs and is not an agent of the U.S. Olin made payments of Missouri sales and use taxes between November 1985 and April 1988, all of which were reimbursed by the U.S.

The contract is a cost plus award fee contract where Olin receives an annual fee for operation and maintenance of the plant and reimbursement for its costs of operating the plant. The annual fee is divided into two portions. The first portion is a base fee, which is approximately 15% of the total fee potential and is paid in 12 monthly payments and represents a 'fixed fee.' It is negotiated in advance and based upon the forthcoming year's projections. The second portion of the annual fee is an award fee and is paid annually. It is based on the Army's evaluation of Olin's operation and management of the plant.

Instead of providing a final manufactured product for the Army, Olin furnishes personnel to manage and operate the plant. The Army reimburses Olin for salaries and other allowable personnel costs. Olin furnishes all equipment, supplies, and materials to operate and maintain the plant as prescribed in the contract. Olin is not required to obtain the U.S.'s specific approval for each transaction, and has the discretion to remove the amount of property from inventory that is needed to perform the contract. Olin must report to the U.S. and most tasks are expressly subject to the direction or approval of the Army's Contracting Officer. Olin issues checks from its account to pay for the property and is reimbursed by the United States for funds expended.

Although Olin executes contracts for the purchase of all tangible personal property needed for the operation of the plant in its own name, the contract provides that the title to the property passes directly to the U.S., incorporating by reference Federal Acquisition Clause 52.245-05. Thus, Olin never holds title to the property purchased. The purchase orders which Olin places with third party vendors also provide for the passage of title to the U.S., consistent with the contract.

I. PROCEDURAL ISSUES

Defendant contends that Plaintiff is an improper party, and argues that Olin purchased the property in question and resold it for cost to the U.S., thus Olin is the proper party to bring this suit. The sales tax was collected from Olin on its purchases from third party vendors. No sales tax was collected from the United States on its reimbursement of Olin's purchases. Section 144.190.2, RSMo. 1986, provides that the entity under Missouri tax law who is required to remit taxes is the seller of tangible personal property and the U.S. is not a seller. Missouri concludes that the U.S. is not the proper party to receive a refund. Additionally, Missouri contends that the U.S. has not followed § 144.190.3,

RSMo. 1989, which provides that "Every claim for refund must be in writing under oath, and must state the specific grounds upon which the claim is founded."

These arguments are premised on a state law action for refund. In an action brought by the U.S. against a county to recover a refund of ad valorem taxes paid by mistake by the U.S. and its contractor, the Eleventh Circuit held:

> In contending that the district court was without subject matter jurisdiction because prior to 1975 payments of taxes were voluntarily made and thereafter the administrative procedure provided by the Georgia statute was ignored, the county misconceives the theory of the Government's claim. It was not posited upon state law, common or statutory, but upon Federal law. Its action sounded in quasi-contractus for the recovery of its treasury funds paid by mistake which resulted in the unjust enrichment of the county. Neither voluntary payment nor the failure to exhaust state administrative remedies was available as a defense to its claim.

United States v. DeKalb County, 729 F.2d 738, 741 (11th Cir. 1984).

Where the U.S. seeks a refund of state taxes erroneously collected from a federal contractor and paid by the U.S., the U.S. is bringing an action in *indebitatus assumpsit*, or quasi-contract, for money had and received, and is not bringing a state law cause of action for refund of taxes. *See U.S. v. Broward County*, 901 F.2d 1005 (11th Cir. 1990); *U.S. v. Michigan*, 851 F.2d 803 (6th Cir. 1988); and *New Orleans v. U.S.*, 371 F.2d 21 (5th Cir. 1967), *cert. denied*, 387 U.S. 944, 87 S. Ct. 2076 (1967), *reh. denied*, 389 U.S. 890, 88 S. Ct. 19 (1967). Under federal common law principles, the U.S. has the right to sue for the recovery of funds paid from the federal treasury, whether or not any specific state statute authorizes the suit. *DeKalb County*, 729 F.2d at 741 n.4.

"The interpretation of a contract between the United States and another party is a federal issue." *U.S. v. Benton*, 729 F. Supp. 671, 673 (W.D. Mo. 1990).

The U.S. is the proper party to bring a quasi-contractual action for money had and received where its contractor has wrongly paid over taxes to a state or political subdivision and the United States has reimbursed the contractor. *See DeKalb County*, 729 F.2d at 738; *U.S. v. Nevada Tax Comm'n*, 439 F.2d 435 (9th Cir. 1971); and *Marquardt Corp. v. Weber County*, 360 F.2d 168 (10th Cir. 1966). Similarly, federal courts have held that the U.S. need not exhaust state administrative procedures, such as presenting a claim for refund in writing, prior to bringing a federal quasi-contractual action. *DeKalb County*, 729 F.2d at 741. The United States' claim will not be dismissed because the U.S. failed to follow § 144.190.3, RSMo. 1986.

Further, this Court previously held that the U.S. demonstrated it suffered direct pecuniary injury as a result of the imposition of the Missouri sales and use taxes on Olin's purchases of tangible personal property, where the contract required the U.S. to reimburse Olin for all purchases of property. *Benton*, 729 F. Supp. at 673. Thus, the U.S. is a proper party; does not lack standing; and need not resort to State courts to obtain relief. *Id.* at 673-76.

Defendants contend the U.S. is procedurally barred from receiving at least a portion of its claimed refund because section 144.190.2, RSMo. 1989, provides:

> No . . . credit or refund shall be allowed unless duplicate copies of a claim for refund are filed within three years from the date of overpayment.

The federal doctrine of sovereign immunity bars the application of state statutes of limitations brought by the United States. *Badaracco v. Commissioner*, 464 U.S. 386, 400 n.10,

104 S. Ct. 756 (1984). Further, 28 U.S.C. § 2415(a), (1980), provides that "every action for money damages brought by the United States . . . which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues." This suit was filed on June 23, 1989, and the period for which the United States seeks a refund is subsequent to June 23, 1983, thus this action is not precluded.

II. IMPOSITION OF SALES TAX

Taxing statutes must be construed strictly, and taxes will not be assessed against the United States unless they are expressly authorized by law. *St. Louis Country Club v. Administrative Hearing Comm'n*, 657 S.W.2d 614, 617 (Mo. banc 1983). It is unconstitutional under *McCulloch v. Maryland*, 4 Wheat 316, 4 L.Ed. 579 (1819), for a state to directly tax the United States or one of its instrumentalities. *See also United States v. County of Fresno*, 429 U.S. 452, 97 S. Ct. 699 (1977). This rule is designed to prevent the states from imposing restraints on the constitutional function of the United States by "hamstringing its power;" interfering with its property; or discriminating "against the Federal Government, its property or those with whom it does business." *Detroit v. Murray Corporation of America*, 355 U.S. 489, 510, 78 S. Ct. 458, 2 L.Ed.2d 441 (1958). In the absence of Congressional exemption, the Supreme Court determines if the legal incidence of the state tax has been placed on the United States, its property or one of its instrumentalities. *United States v. Forst*, 442 F. Supp. 920, 923 (W.D. Va. 1977), *aff'd* 569 F.2d 811 (4th Cir. 1978).

"The Supreme Court has made it explicit that the contracting parties—that is, the United States and its contractor, have the power, when Congress has not waived governmental immunity, to prevent the state taxation on the sales by altering the form of their contract to make the contractor the purchasing agent of the

United States with the authority to bind the credit of the United States." *Forst*, 442 F. Supp. at 924, citing *Kern-Limerick Inc. v. Scurlock*, 347 U.S. 110, 122, 74 S. Ct. 403 (1954). Additionally, if the U.S. had directly paid the third party vendors for the property delivered to its plant, this case would be moot.

Section 144.020.1, RSMo. 1986, imposes a tax:

> upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state.

The Missouri legislature has defined "at retail" as:

> any transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration . . .

§ 144.010.1(8).

In essence, § 144.010.1(8) sets forth the requirements for a sale "at retail" as a transfer which is (1) for use or consumption and (2) not for resale. *See Odorite of America Inc. v. Director of Revenue*, 713 S.W.2d 833, 836-37 (Mo. banc 1986).

III. "RESALE"

The U.S. contends Olin's purchases of tangible personal property are for the sole purpose of reselling the property to the U.S. The U.S. and Olin have contracted that title passes directly from the vendor to the U.S. upon delivery of the tangible personal property, whether delivery occurs at the shipping point or at the plant. Olin's purchase orders provide for title passage to occur upon delivery. The U.S. contends that title passage governs when a retail sale occurs, and, here, title passes upon delivery. The U.S. asserts that both the parties' intent and the

completion of performance evidence that Olin's resale to the U.S. takes place upon delivery at the plant. At that time, title passes to the U.S., and a retail sale occurs. The U.S. concludes that since Olin has the power to designate the U.S. as the party to whom the vendor transfers title, Olin is a seller, and a sale takes place upon delivery.

The legal incidence of the Missouri sales tax falls upon the purchaser of tangible personal property. *See* § 144.060, RSMo. 1986. Missouri seeks to impose a sales tax on Olin for its purchases. Here, Olin pays the purchase price of the property and the sales tax and Olin is subsequently "reimbursed" by the U.S. for the purchase price and sales tax. The question becomes whether Olin resells the property to the United States. *See* § 144.010.1(8). This Court previously stated:

> The applicable Missouri statutes are unambiguous. It is the contractual relationship between the United States and Olin that lies at the heart of this case. Only by interpreting and construing that relationship can the Court determine whether Missouri can lawfully require Olin to pay sales and use taxes on personal property purchased pursuant to the contract.

United States v. Benton, 729 F. Supp. 671, 675 (W.D. Mo. 1990).

Although Missouri statutes do not define "resale," they do define "sale." The definition of "sale" in the use tax statutes is applicable to the definition of "resale." *Smith Beverage Co. v. Reiss*, 568 S.W.2d 61, 63 (Mo. banc 1978). Section 144.010.1(7), RSMo. 1986, defines sale as:

> any transfer, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for valuable consideration . . .

The purchaser of items sold is defined by the U.S. Supreme Court as the person who orders the goods and either pays for

them or is legally obligated to pay for them if the sale is on credit. *Alabama v. King & Boozer*, 314 U.S. 1, 10, 62 S. Ct. 43 (1941) (upholding the state tax, finding that the contractors were to purchase in their own names and on their own credit and that the Government was not bound by their purchase contract). Defendants and plaintiff concur that Olin has made a purchase of the property. The U.S. is obligated, per contractual agreement, to reimburse Olin for this purchase.

State ex rel. Thompson–Stearns–Roger v. Schaffner, 489 S.W.2d 207 (Mo. 1973), is discussed in depth by both parties, each having a much different analysis of the case. This case involves the activities of two joint venture, independent contractors for the United States. Both entered into cost-plus-fixed fee contracts with the U.S. Pursuant to its contract with the U.S., Thompson–Stearns–Roger was to rehabilitate, convert and construct facilities for the manufacture of a defoliant. Mason-Rust, the other contractor, was contractually obligated to perform the same services at another plant.

Pursuant to their respective contracts, the contractors purchased a variety of tools, materials, construction supplies and other tangible personal property. Upon approval by a government representative at the site, bids were solicited. When the bids were approved, a purchase order was awarded. The property was shipped directly to the government job site where the government representative inspected it and gave his approval. Both contracts provided that title and risk of loss passed directly from the vendor to the U.S. upon delivery. All property was invoiced by the vendor to the contractor. The contractor paid the invoice and was reimbursed by the U.S. *Id.* at 212-14.

The contractors argued that they were not "purchasers" liable for the sales tax under the Missouri sales tax statutes, *Id.* at 214, whereas Olin concedes it is a purchaser and argues it resells tangible personal property to the U.S. The Court held that the

contractors "largely overlooked the alternative transfer of 'ownership' as giving rise to a taxable transaction" and the contractors had such dominion over the property as enabled them to designate the transferee of the "title," and were therefore "purchasers." *Id.* at 215. The Court concluded that the legislature must have intended the "myriad of transactions where the purchase price is paid by one who does not receive technical legal title but who exercises dominion over the property to be transaction subject to sales tax." *Id.* "No other reasonable explanation for the use of the alternative term [ownership] appears." *Id.* Thus, the purchase of an ownership interest, i.e., such dominion over property to designate the transfer of title, is a taxable retail sale pursuant to *Thompson–Stearns–Roger*. However, if the purchase is for resale, then it is not a taxable retail sale. *See* § 144.010.1(8).

Missouri argues that Olin's transfer of title is not a resale because Olin retains an ownership interest, because Olin still manages and operates the plant at which the property at issue is employed. *Thompson–Stearns–Roger* did not address whether the contractor resold the tangible personal property to the U.S. The U.S. goes one step further and argues Olin resells the property to it. Thus, this is a question of first impression in the State of Missouri.

Arguably, Olin has an interest in the property. Missouri finds it conclusive that Olin manages and operates the plant which in effect means that Olin manages and operates the tangible personal property, whose title is vested in the U.S. To the extent Olin has an interest in the property, its interest is subservient to that of the United States', which is contractually obligated to pay Olin for the property. Olin's control is subservient to that of the U.S. "The (sales) tax is imposed upon sales for use or consumption. That means use or consumption by the purchaser." *Berry-Kofron Dental Laboratory Co. v. Smith*, 345 Mo. 922, 137 S.W.2d 452,

456 (Div. 2 1940).[1] After title passes, Olin merely accesses the property to perform its contractual obligations. This retained interest is de minimis and insufficient to hold that a resale did not occur. The statute specifically states a "resale in any form." Undoubtedly, Olin's sale is in a form different than that of many other sales, since Olin manages and operates the plant in which the property is employed. However, this does not preclude the "form" of "resale" the U.S. and Olin envision from occurring.[2] In effect, defendants are contending Olin uses something it has resold.[3]

Missouri cites 12 C.S.R. 10-3.262(2), which provides:

> Persons selling tangible personal property to contractors with the United States government or its agencies, the state of Missouri or Missouri political subdivisions, are subject

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[1] The court rejected the Department of Revenue's contention that the dentist used or consumed a denture by placing it in his patient's mouth as part of his professional services. The court held that the denture was ordered for the patient, who is the user and consumer. Here, the U.S. is the ultimate user and consumer of the tangible personal property. In fact, if anyone uses the property, it is the U.S. *Chrysler Corp.*, 114 So.2d at 584-86; *General Motors Corp.*, 320 P.2d at 812; *Tawes*, 124 A.2d at 814. The legislature subsequently amended the statute, stating that tangible personal property made by dentists and used in their profession shall be deemed to have been purchased for use or consumption, and, hence, taxable.

[2] This Court's holding is consistent with other Court's. *See Chrysler Corp. v. New Orleans*, 114 So.2d 579 (1959); *General Motors Corp. v. State Comm'n of Revenue and Taxation*, 182 Kan. 237, 320 P.2d 807 (1958), *cert. denied*, 358 U.S. 875 (1958); *Avco Mfg. Corp. v. Connelly*, 145 Comm. 161, 140 A.2d 479 (1958); and *Tawes v. Aerial Products. Inc.*, 210 Md. 627, 124 A.2d 805 (1956).

[3] Missouri cites *R&M Enterprises. Inc. v. Director of Revenue*, 748 S.W.2d 171 (Mo. banc 1988) and *Odorite of America. Inc. v. Director of Revenue*, 713 S.W.2d 833 (Mo. banc 1986). Neither of these cases involve a resale. In neither case does the purchaser transfer title or ownership for consideration as Olin transfers to the U.S.

> to the sales tax on all sales, regardless of, to whom the contract or purchase order designates title is to pass.

Missouri statutes provide that sales tax will be imposed on retail sales, § 144.020.1, RSMo. 1986, which are defined as a transfer of tangible personal property to the purchaser, for use or consumption and not for resale. §144.010.1(8), RSMo. 1986. To the extent there is a conflict between 12 C.S.R. 10-3.262(2) and § 144.020.1, RSMo. 1986, the statute controls. Thus, Olin's purchases are taxable to the extent they are not for resale. §144.010.1(8), RSMo. 1986.

The definitions of "purchaser" and "seller" are substantially similar. *Cf.* §§ 144.010.1(6) and (9), RSMo. 1986. Missouri Department of Revenue's Rule No. 28, compares the terms "purchaser" and "seller:"

> It is not necessary for a person to have an ownership interest in or title to the tangible personal property transferred to the purchaser for that person to be considered a seller under the Missouri state sales tax laws. The power to designate who is to obtain title to the property or to physically transfer the property is enough to categorize the person as a seller of the property.

12 C.S.R. 10-3.012(3).[4]

Olin pays the third party vendor and is subsequently reimbursed by the U.S. Olin instructs the vendor, through its purchase order, to transfer title to the U.S. Only Olin is bound by the

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[4]Missouri argues that this is only applicable to auctioneers. The regulation's stated purpose is to interpret "the sales tax law as it applies to persons selling tangible personal property at auctions for unknown principals and" *and* to interpret and apply §§ 144-010-1(8) *and* (9) and 144.020, RSMo. 1986 (emphasis added). The stated purpose clearly provides that it is not only applicable to auctioneers but is also applicable to the interpretation of §§ 144.010.1(8) and (9) and 144.020, RSMo. 1986.

purchase order. Olin admits it is a purchaser and designates the transfer of title to the U.S. at the point of delivery. The U.S. correctly contends this creates a retail sale. 12 C.S.R. 10-3.0112(3) indicates that Olin's power to designate that the U.S. is the entity to receive title is sufficient to characterize it as a seller, and thus a resale occurs, pursuant to §144.010.1(8), RSMo. 1986.

Missouri cites *United States v. Forst*, 442 F. Supp. 920, 924 (W.D. Va. 1977), which held that "it is not critical who holds title to the purchased items as between the United States and its contractor. Nor is the degree of control over the contractor that the United States exercises with respect to the purchases critical. The key factor is whose credit, between the United States and the contractor, is bound by the purchasing agreement with the seller."

In *Forst*, the district court found that the resale exemption in Virginia's statutes was "designed only to prevent multiple sales tax incidence for the same tangible personal property," *Forst*, 442 F. Supp. at 925, and that the government contractor was the final consumer-purchaser of the tangible personal property. As in this case, the government contractor never had legal title to the items for which it was reimbursed fully by the U.S. However, the items were "purchased by the government contractor for its consumption in the performance of its contract with the United States. . . . We cannot say that any of these items were 'resold' to the United States." Here, Olin exercises substantial control over the procurement of the property and its sole credit was involved in the purchases from vendors. Thus, under *Forst*, Olin's purchases would be taxable. This Court declines to follow *Forst*, but instead follows the holdings of the vast majority of other courts addressing this issue.

In *Comptroller of Treasury v. Glenn L. Martin Co.*, 216 Md. 235, 140 A.2d 288 (Md.), *cert. denied*, 358 U.S. 820 (1958), the contractor entered into contracts with the Navy and Air Force to

purchase facilities and equipment to manufacture airplanes and weapons. Title to the property was to pass upon delivery. The contractor used the purchased facilities and equipment free of charge to manufacture munitions and airplanes for the U.S. *Id.* at 290. The Maryland court held that the sale to the contractor was a sale-for-resale, because title vested with the government upon delivery of the property, pursuant to the contractor's contracts with the government and the, government's reimbursement of the contractor. The right of the U.S. to reject the goods was not a material factor. *Id.* at 292. In *Martin*, the taxpayer was selling a finished product to the U.S., whereas Olin has no obligation to deliver a finished product to the U.S.

State Tax Comm'n v. Graybar Elec. Co., 86 Ariz. 253, 344 P.2d 1008, 1012 (1959), had similar facts, and the Court held that since the property was "used as directed by the United States and the title thereto was in the Government, it can be logically concluded that the initial acquisition by Grand Central was either as an agent of the Government or for immediate resale to the Government."

In *Day & Zimmermann. Inc. v. Calvert*, 519 S.W.2d 106 (Tex. 1975), *cert. denied*, 423 U.S. 832 (1975), the contractor had a cost plus award fee contract with the U.S. to operate a government owned plant. As with Olin and the U.S., its responsibilities as operator of the plant included loading, assembling, and packaging of ammunition and related components, and the procurement of all necessary materials, supplies, equipment and services. As with Olin and the U.S., all land and buildings were owned by the U.S. and under the command of a military officer, and the contract had a title vesting clause that called for title to pass directly from the vendor to the U.S. upon delivery. In *Day*, the contractor had the right to assign title, and the U.S. reimbursed the contractor prior to the contractor paying the vendors. Here, the title passes directly from the vendor to the U.S. upon delivery and Olin pays the vendor prior to the U.S.'s reimburse-

ment. The Supreme Court of Texas held that a resale occurred because there were two distinct, identifiable transactions. The vendor sold the property to the contractor and the contractor sold the property to the U.S. Thus, a sale for resale had occurred and the sale to the contractor was not a taxable sale. *See Lockheed Aircraft Corp. v. State Bd. of Equalization*, 81 Cal. App.3d 257, 146 Cal. Rptr. 283 (2nd Dist. 1978) and *Martin Marietta Corp. v. Regional Transp. Dist.*, 772 P.2d 668 (Colo. App. 1989), *cert. granted*, 785 P.2d 916 (Colo. 1989), for comparable holdings. All of the above cases, except *Forst*, are consistent with Missouri's goal of taxing the ultimate purchaser, which is the U.S. in this case.

The Missouri Supreme Court has held that the contractual relationship of the parties determines whether and when a taxable event takes place for purposes of the state sales and use tax, and the passage of title is the crucial taxable event for purposes of the sales tax. *State ex rel. Otis Elevator Co. v. Smith*, 357 Mo. 1055, 212 S.W.2d 580, 582 (Mo. banc 1948); *Marsh v. Spradling*, 537 S.W.2d 402, 405 (Mo. 1976); and *Kurtz Concrete. Inc. v. Spradling*, 560 S.W.2d 858, 860 (Mo. banc 1978). Section 400.2-401(1), RSMo. 1986, provides that: "title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties." If the contract between the buyer and the seller requires delivery at destination, title passes upon tender there. *Id.* at .2-401(2)(b). The contract provides that Olin and the U.S. have agreed that title passes directly from the vendor to the U.S. upon delivery of the tangible personal property at the plant. Additionally, the vendors and Olin have the same agreement in Olin's purchase orders, thus effecting a "resale."

The Missouri Supreme Court addressed an analogous situation in *Canteen Corp. v. Goldberg*, 592 S.W.2d 754 (Mo. banc 1980). There, Canteen rented space from Council Plaza and operated a dining facility for retired people. Canteen billed

Council Plaza at a predetermined price per meal for the number of meals served. Council Plaza then billed the retirees for their meals. Council Plaza was legally obligated to pay Canteen for all meals served, whether or not Council Plaza received payment from retirees. *Id.* at 756. The Court held that two transactions took place. Canteen sold meals to Council Plaza for the purpose of Council Plaza selling the meals to the retirees. *Id.* Thus, there was not a taxable sale at retail from Canteen to Council Plaza, just as there is no sale at retail from third party vendors to Olin.

The contract between Olin and the U.S. expressly provides for title passage from third party vendors to the U.S. at the time of delivery. Once title passes, Olin no longer has dominion over the property. The dominion temporarily possessed by Olin to designate the transfer of title makes Olin a seller. 12 C.S.R. 10-3.012(3). Once title passes to the U.S., the U.S. has discretion as to the utilization of that property. The only significant interest Olin possesses is the dominion over the property to designate the transfer of title. *Thompson–Stearns–Roger*, 489 S.W.2d at 215. Thus, a resale is effected, making Olin's purchases of tangible personal property in accord with its contract with the U.S., a nontaxable transaction pursuant to § 144.010.1(8). There "is no question that the General Assembly in enacting the sales tax law intended to place the burden of the tax upon the person paying the purchase price." *Thompson–Stearns–Roger*, 489 S.W.2d at 215. Here, the U.S. directly pays the purchase price.

Missouri argues that the U.S. did not pay for the title and Olin is not compensated for the transfer of the title, thus there is no resale to the U.S. This is incorrect. Olin is reimbursed for all expenses in operating and managing the plant, including the cost of property purchased pursuant to the contract. In addition, Olin is paid a base fee and an award fee under the contract. Section 144.010.1(8) merely requires the transfer to be for "valuable consideration." Whether and if Olin shows a profit on the resale to the U.S., or from the base fee or award fee, this Court need not

determine, because a lack of profit upon resale does not prevent a finding of a purchase for resale. *Glenn L. Martin Co.*, 140 A.2d at 292. Defendants raise numerous other arguments which are without merit and are summarily denied.

A transfer of ownership in tangible personal property is effected from vendors to Olin and a separate transfer of ownership effected from Olin to the U.S., when Olin directs the vendors to transfer title. Section 144.010.1(8) expressly requires a transfer for valuable consideration to be (1) for use or consumption and (2) not for resale in any form. Olin's purchases from vendors are for resale to the U.S., thus the transactions between Olin and vendors are not "at retail," as defined in section 144.010.1(8). Since the transactions are not "at retail," a section 144.020.1 imposition of tax is not applicable to the transfers at issue. This Court need not reach the issue as to whether Olin uses the tangible personal property since Olin resells the property to the U.S.

The U.S. requests this Court to set a schedule for the calculation of remedial relief. The U.S. has stated in its answers to interrogatories and in deposition testimony, the amounts it claims are due. Thus, there is no need to establish a schedule.[5]

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[5] The parties address whether Olin should pay a use tax on the property used at the government owned facility. A tax cannot be imposed on Olin because it resells the property to the U.S. The Missouri Supreme Court has held that when the legislature exempts sales from the sales tax, the legislature clearly evidences a desire to exempt the property from a use tax. *Southwestern Bell Telephone Company v. Morris*, 345 S.W.2d 62, 67 (Mo. banc 1961). "To hold otherwise would practically nullify the obvious legislative intent." *Id.* Thus, in exempting the vendors' sales to Olin from a sales tax, the Missouri legislature obviously intends to exempt the same sales from a use tax. *See* § 144.615(b), RSMo. 1986, which exempts tangible personal property held for resale from taxes levied in §§ 144.600 to 144.745. To any extent Olin "holds" or has an interest in the tangible personal property, it is for the sole purpose of reselling the property to the U.S.

Accordingly, it is hereby ORDERED that Plaintiff's motion for summary judgment is GRANTED, and Defendants' motion for summary judgement is DENIED.

IT IS SO ORDERED.

/s/Elmo B. Hunter
SENIOR U.S. DISTRICT JUDGE

DATED: 10-25-90

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 89-0608-CV-W-3

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DUANE BENTON, Director of Revenue, State of Missouri;
MISSOURI DEPARTMENT OF REVENUE;
and STATE OF MISSOURI,
Defendant.

MEMORANDUM OPINION AND ORDER

[Filed: Feb. 1, 1990]

The Court has pending before it a Motion to Dismiss Plaintiff's Complaint pursuant to Rule 12(b), Fed. R. Civ. P., and a Motion for Stay of Discovery filed by defendants Duane Benton, Missouri Director of Revenue; the Missouri Department of Revenue; and the State of Missouri. The facts of the case are a follows.

Olin Corporation ("Olin"), a private, for-profit government contractor, contracted with the Department of the Army to operate and maintain the Lake City Army Ammunition Plant (the "plant"), a government-owned facility manufacturing small arms ammunition. According to plaintiff, Olin purchases personal property necessary for the operation of the plant and is reimbursed by plaintiff for all such purchases pursuant to the contract. Plaintiff states that under the contract, title to all tangible personal property purchased by Olin passes to plaintiff upon delivery of the property by the vendors.

Plaintiff alleges that between November 3, 1985, and April 1, 1988, Olin made payments of Missouri sales and use taxes in the amount of approximately $862,000 on those purchases of tangible personal property which were made in its performance of the contract. On April 1, 1988, Olin ceased making payments of Missouri sales and use taxes on those purchases of personal property, contending that it purchased the property for the purpose of reselling it to the United States and that the Missouri sales taxes do not apply to such sales for resale.[1] Plaintiff further contends that because Olin does not store, use, or consume the tangible personal property it purchases pursuant to the contract, Missouri use taxes are not applicable. Finally, plaintiff asserts that Olin's holding of tangible personal property for resale to plaintiff is exempted from the Missouri use tax.[2]

Plaintiff invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1331[3] and 28 U.S.C. § 1345.[4] Plaintiff seeks the following relief:

> (1) That this Court enter a judgment declaring that (a) the imposition, assessment, or collection by the defendants of

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[1] Mo. Rev. Stat. § 144.020(1) levies a tax "[u]pon every retail sale in this state of tangible personal property . . . ." Mo. Rev. Stat. § 144.010(8) defines "sale at retail" to mean "any transfer . . . of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible, personal property . . . ."

[2] Mo. Rev. Stat. § 144.615(6) exempts from Missouri use tax "[t]angible personal property held by processors, retailers, importers, manufacturers, wholesalers, or jobbers solely for resale in the regular course of business."

[3] 28 U.S.C. § 1331 provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the constitution, laws or treaties of the United States."

[4] 28 U.S.C. § 1345 provides that "[e]xcept as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."

sales taxes on those purchases by Olin of tangible personal property which are made in its performance of the Contract is unlawful, void, and of no effect because Olin purchased the property for the purpose of reselling it to the United States and the sales to Olin therefore were not retail sales within the purview of Mo. Rev. Stat. § 144.010.1(8) and (b) the imposition, assessment, or collection by the defendants of use taxes on all articles of tangible personal property purchased by Olin in its performance of the Contract is unlawful, void, and of no effect because Olin does not store, use or consume property within the meaning of Mo. Rev. Stat. § 144.610() and/or because Olin's holding of tangible personal property for resale to the United States is exempted from the use tax under Mo. Rev. Stat. § 144.615(6)

2. That this Court enter preliminary and permanent injunctions in favor of the plaintiff, the United States of America, enjoining the defendants, their successors in office, their employees, agents, attorneys, and all persons acting in concert with them who shall receive notice thereof, from assessing, imposing, or collecting the Missouri sales and use taxes, Mo. Rev. Stat. §§ 144.020 and 144.610, on purchases of tangible personal property made by Olin in its performance of the Contract.

3. That this Court order the defendants to refund to the United States of America, with interest, all sales and use taxes which have been paid to the State of Missouri on purchases of tangible personal property made by Olin in its performance of the Contract.

4. That this Court order that the plaintiff have its costs in this action and that this Court grant such other and further relief as is just and proper.

Defendants move to dismiss the action on the following grounds: (1) the federal government lacks standing to sue; (2) the action

is barred by the Federal Tax Injunction Act, 28 U.S.C. § 1341; and (3) the Court should abstain on principles of comity.

I. Standing

Defendants argue that plaintiff lacks standing to assert jurisdiction and therefore is not a proper party to this action. Specifically, defendants contend that plaintiff is merely bringing this suit on behalf of Olin and, consequently, plaintiff's complaint fails to allege a direct injury to plaintiff caused by defendants. In its suggestions in opposition to defendants' motion, plaintiff counters that it has suffered a direct pecuniary injury as a result of the imposition of Missouri sales and use taxes on Olin, because "[a]ny sales and use taxes assessed or imposed under Missouri law on Olin in its performance of the Contract have in the past and would be in the future paid from the funds of the United States in accordance with the provisions of the Contract." Plaintiff's Complaint ¶ 15. The contract requires the federal government to reimburse Olin for all purchases of tangible personal property made pursuant to the contract.

The United States Supreme Court has identified the Article III requirements a plaintiff must meet in order to have standing. These requirements are: (1) an allegation of actual or threatened injury to the plaintiff; (2) the injury alleged by plaintiff must be fairly traceable to the action of the defendant that is challenged in the lawsuit; and (3) the injury alleged by plaintiff must be likely to be addressed by a favorable decision of the court. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 102 S. Ct. 752, 70 L.Ed.2d 700 (1982); *see Belles v. Schweiker*, 720 F.2d 509, 513 (8th Cir. 1983).

The Court finds that the United States has alleged actual direct pecuniary injury resulting from its obligation to reimburse Olin for purchases of personal property made pursuant to the contract. *United States v. Commonwealth of Virginia*, 500 F. Supp. 729,

731 (E.D. Va. 1980); *see Marquardt Corp. v. Weber County Utah*, 360 F.2d 168, 171 (10th Cir. 1966). The last two requirements for standing are also met in this case. Accordingly, the Court finds that the United States has standing to assert jurisdiction and is a proper party to bring this action.

Defendants argue that plaintiff lacks standing under *United States v New Mexico*, 455 U.S. 720, 102 S. Ct. 1373, 71 L.Ed.2d 580 (1982). In *New Mexico* the United States brought an action challenging state taxation of three government contractors as violative of its constitutional tax immunity. The Supreme Court held that "tax immunity is appropriate only in one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned." 455 U.S. at 735, 71 L.Ed.2d at 592. In citing *New Mexico* defendants are confusing a jurisdictional issue with a substantive determination. The Supreme Court's restrictive holding in *New Mexico* is relevant to a determination of whether a valid claim for relief has been stated. *New Mexico* is not relevant to the threshold question of standing.

II. Tax Injunction Act

Defendants contend that plaintiff's action is barred by the provisions of the Tax Injunction Act, 28 U.S.C. § 1341, which provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

While § 1341 acts to bar a private litigant from challenging state taxation, *see Coon v. Teasdale*, 567 F.2d 820 (8th Cir. 1977), it is well-settled that § 1341 is not applicable to suits by the United

States challenging the constitutionality of a state tax being levied on the federal government or on one of its agencies or instrumentalities. *See United States v. State of Michigan*, 851 F.2d 803, 805 (6th Cir. 1988).

Defendants assert that the United States is merely standing in the shoes of Olin, a private party, and is therefore barred from bringing this action by § 1341. A similar argument was rejected by the United States District Court for the District of Colorado in *United States v. State of Colorado*, 666 F. Supp. 1479 (D. Colo. 1987). In *State of Colorado* the United States challenged the imposition of a state gasoline sales tax on purchases of gasoline for sale in exchange service stations on military reservations in Colorado. *Id.* at 1480. The defendants argued that the action was barred by § 1341 because the government was merely seeking to protect the private interests of individual servicemen. *Id.* at 1481. The district court dismissed this argument, having previously established the United States did have a real interest in the dispute. *Id.* Likewise, this Court has already determined that the United States is a real party in interest. The United States is not merely standing in the shoes of a private party. Instead, the government has allegedly suffered a direct injury at the hands of defendants. Accordingly, this ground of challenge is denied.

Defendants further contend that the United States is exempt from 28 U.S.C. § 1341 only where it challenges state taxation on *federal constitutional grounds*. Defendants maintain that § 1341 acts to bar this action, because the United States has not alleged that the challenged state taxation violates the constitution. In support of this argument, defendants cite *United States v. Livingston*, 179 F. Supp. 9 (E.D.S.C. 1959), *aff'd*, 364 U.S. 281, 80 S. Ct. 1611, 4 L.Ed.2d 1719 (1960). In *Livingston* the United States sought to enjoin the collection of state sales and use taxes upon the use of purchased materials at a government facility, claiming such taxation violated its constitutional immunity. The *Livingston* court concluded that § 1341 does not deprive a federal

court of jurisdiction over an action by the United States in which the government seeks protection of its sovereign immunity from state taxation. *Id.* at 12. However, the court noted:

> Were the United States seeking to avail itself of an exemption or privilege granted by the state, we might, nevertheless, feel constrained to withhold action until the state courts decided the limits of the state's exclusionary grants. Here the sole question is whether or not the United States is the real purchaser and user of the purchased articles so as to make their purchase and use immune from state taxation. That question arises under the Constitution of the United States and its answer is not dependent upon the resolution of any question of state law. It is our duty to consider the federal question, and there is no basis for a remission of the plaintiffs to the state courts (citation omitted).

Id. Thus, the *Livingston* court indicated that an action brought by the United States challenging state taxation on purely state law grounds would be prohibited by § 1341.[5]

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[5] This Court has found only one other case which distinguishes between the type of claim raised by the United States for the purposes of § 1341. In *United States v. Montgomery County, Maryland*, 761 F.2d 998 (4th Cir. 1985), the United States attacked the constitutionality of a room rental law. The district court interpreted the state statute in a manner which completely avoided the constitutional question. *Id.* at 1000. The Fourth Circuit commented that § 1341 does not operate to bar the federal government from seeking relief from a state tax exaction on constitutional grounds. *Id.* However, the Fourth Circuit was disturbed by the fact that the district court's decision was based solely upon a construction of the state statute and not on constitutional grounds. The appellate court suggested that "[p]erhaps, applying the anti-injunction statute, the case should have been remitted to [state court] since, on either approach, [the district judge's] or [the county's], the tax was not levied on the United States." *Id.* The court concluded, however, that the fact the government initially challenged the statute solely on constitutional grounds spared the necessity of relitigating in state court. *Id.* at 1001.

In the instant case, the United States has not alleged that the imposition of Missouri sales and use taxes infringes upon its constitutional immunity from state taxation. Defendants construe this case as involving only the interpretation of state law and argue that under *Livingston* the United States is barred by § 1341 from challenging the state taxation.[6] However, the Court finds that defendants have misconstrued the real issue involved in this case. Plaintiff counters, and the Court agrees, that "[t]he question in the present action is whether the contract provides that purchases made by Olin in its performance of the Contract are for the purpose of resale to the United States." Plaintiff's Suggestions in Opposition to Defendants' Motion to Dismiss at 3. The applicable Missouri statutes are unambiguous. It is the contractual relationship between the United States and Olin that lies at the heart of this case. Only by interpreting and construing that relationship can the Court determine whether Missouri can lawfully require Olin to pay sales and use taxes on personal property purchased pursuant to the contract. The interpretation of a contract between the United States and another party is a federal issue. *United States v. Jackson County. Missouri*, 696 F. Supp. 479, 484 (W.D. Mo. 1988). Thus, this case does not involve "interpretation or general application of state laws" or "an exemption or privilege granted by the state." *Livingston*, 179 F. Supp. at 11-12. It is not a case of "purely statutory construction." *Montgomery County, Maryland*, 761 F. 2d at 1000. Instead, it involves an important federal question. Under these

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[6]Even if the Court viewed this case as raising only an issue of state law, that determination would not necessarily require dismissal of this action pursuant to § 1341. In *United States v. Commonwealth of Virginia*, 500 F. Supp. 729 (E. Va. 1980), the district court held § 1341 did not bar an action brought by the United States in which only the construction of a state statute was at issue. In *United States v. State of Colorado*, 666 F. Supp. 1479 (D. Colo. 1897), the district court rejected the defendant's § 1341 challenge even though the United States alleged only that a state statute exempted it from the provisions of a gasoline sales tax statute.

circumstances, the Court concludes that the United States is not barred by § 1341 from bringing this action in federal court.

The cases discussing the applicability of § 1341 are by no means clear with regard to the question of whether the United States is exempt from § 1341 only when it challenges states taxation on federal constitutional grounds.[7] However, the Court has found several cases in which the United States was allowed to challenge state taxation on grounds other than constitutional immunity. For example, it is well-settled that § 1341 does not apply to suits brought by the United States challenging state taxation of military personnel as violative of the Soldiers' and

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[7] Several cases state the limited proposition "that § 1341 does not act as a restriction upon suits by the United States to protect itself and its instrumentalities from *unconstitutional* state exactions" (emphasis added). *Department of Employment v. United States*, 385 U.S. 355, 358, 87 S. Ct. 464, 17 L.Ed.2d 414, 417 (1966); *United States v. State of Michigan*, 851 F.2d 803, 805 (6th Cir. 1988); *United States v. City of Pittsburgh*, 589 F. Supp. 179, 182 (W.D. Pa. 1984), *rev'd on other grounds*, 757 F.2d 43 (3d Cir. 1985); *United States v. State Board of Equalization*, 450 F.Supp. 1030, 1032 (N.D. Cal. 1978). However, in each of these cases the United States challenged the state taxation on constitutional grounds. Other cases involve constitutional challenges to state taxation, but the courts used broad, general language when discussing the effect of § 1341. *See United States v. Anderson County, Tenn.*, 705 F.2d 184, 188 (6th Cir. 1983) (§ 1341 "does not restrict the United States from access to the federal forum when it seeks to assert its own interest or that of its instrumentalities"); *United States v. Lewisburg Area School District*, 539 F.2d 301, 311 (3d Cir. 1976) (§ 1341 "does not bar the United States from access to its own courts when it seeks to asserts its own interest or that of its instrumentalities"); *United States v. City and County of Denver*, 573 F. Supp. 686, 688 (D. Colo. 1983) (§ 1341 "does not exclude the United States from its own courts when it asserts its own interests"); *United States v. Dorgan*, 385 F. Supp. 349, 353 (D.N.D. 1974) (§ 1341 "[is] not applicable where a United States plaintiff seeks to enjoin state tax proceedings"). Finally, at least two cases hold that § 1341 does not apply to any case filed by the United States because the statute does not specifically preclude actions by the sovereign. *United States v. Bureau of Revenue of State of New Mexico*, 291 F.2d 677 (10th Cir. 1961); *United States v. Woodsworth*, 170 F.2d 1019 (2d Cir. 1948).

Sailor's Civil Relief Act, as amended, 50 U.S.C. App. § 574. *See United States v. County of Champaign, Illinois*, 525 F.2d 374, 376 (7th Cir. 1975); *United States v. Arlington County, Commonwealth of Virginia*, 326 F.2d 929 (4th Cir. 1964) (United States not subject to § 1341 where it in at has a proprietary interest); *United States v. Sullivan*, 270 F. Supp. 236, 240 (D. Conn. 1967) (right of United States to sue as plaintiff in a federal district court is not limited by § 1341), *aff'd on other grounds*, 398 F.2d 672 (2d Cir. 1968), *rev'd on other grounds*, 395 U.S. 169, 89 S. Ct. 1648, 23 L.Ed. 182 (1969).

In *United States v. City of Glen Cove*, 322 F. Supp. 149 (E.D.N.Y.), *aff'd*, 450 F.2d 884 (1971), the United States sought to enjoin the assessment of state taxes against property owned by a foreign nation, claiming the property was exempt from taxation pursuant to a federal treaty. The court rejected the defendant's argument that § 1341 precluded jurisdiction, stating broadly that "section 1341 has been held to be no bar to jurisdiction of suits instituted by the United States." *Id.* at 152.

In *United States v. State of Maryland*, 488 F. Supp. 347 (D. Md.), *aff'd*, 636 F.2d 73 (4th Cir. 1980), *cert. denied*, 451 U.S. 1017, 101 S. Ct. 3005, 69 L.Ed.2d 388 (1981), the United States challenged the imposition of state income taxes upon a congressman residing in Maryland as violating 4 U.S.C. § 113. Although the United States did not challenge the tax as unconstitutional, the district court found that "the provisions of the Tax Injunction Act do not erect a jurisdictional bar to actions brought by the United States as plaintiff." *Id.* at 365.

In *United States v. Jackson County, Missouri*, 696 F. Supp. 479 (W.D. Mo. 1988), the United States owned a Department of Energy (DOE) nuclear weapons components production plant. *Id.* at 481. Bendix managed, operated and maintained the DOE plant under contract with DOE. *Id.* The Jackson County Board of Equalization assessed manufacturing, inventory and equip-

ment for the tax years 1979 through 1984 and assessed business and personal property for the same years. *Id.* at 483. The defendants asserted that the intent of Missouri law is to tax *any* interest in property and that the contract between DOE and Bendix created a possessory interest in Bendix. *Id.* at 483-84. The federal government challenged the assessment of taxes as prohibited by the United States Constitution and the laws of Missouri. The district court construed the contract as granting Bendix a mere license to operate the DOE plant and found that the contract did not convey a taxable interest in property to Bendix. *Id.* at 486. The court concluded that § 1341 was not a barrier to the action even though it resolved the question through interpretation of the contract and did not consider whether the challenged tax assessments violated the constitution. *Id.* at 483-86.

These cases support this Court's decision that § 1341 does not deprive the Court of jurisdiction in the instant case. None of the cases discussed above turned on a question of constitutional immunity, but each case did involve an important federal issue. Likewise, this case raises an important federal question. Although the United States is not challenging the state taxation on federal constitutional grounds, this case is not limited to a question of state law. In deciding that § 1341 does not bar the case at hand, however, the Court does not comment on whether § 1341 would in fact bar this action if it turned solely upon a question of state law.

The Court has considered all remaining issues raised in defendants' motion and finds that they do not warrant dismissal of plaintiff's complaint.

III. Conclusion

It is hereby ORDERED

that defendants' Motion to Dismiss Plaintiff's Complaint is denied. It is further ORDERED

that defendants' Motion for Stay of Discovery is denied.

IT IS SO ORDERED.

/s/ Elmo B. Hunter
SENIOR U.S. DISTRICT JUDGE

Date: 2-1-90

APPENDIX F

Federal Acquisition Regulation 31.205-41

Taxes.

(a) The following types of costs are allowable:

(1) Federal, State, and local taxes (see Part 29), except as otherwise provided in paragraph (b) below that are required to be and are paid or accrued in accordance with generally accepted accounting principles. Fines and penalties are not considered taxes.

(2) Taxes otherwise allowable under subparagraph (a)(1) above, but upon which a claim of illegality or erroneous assessment exists; provided the contractor, before paying such taxes -

(i) Promptly requests instructions from the contracting officer concerning such taxes; and

(ii) Takes all action directed by the contracting officer arising out of subparagraph (2)(i) above or an independent decision of the Government as the the existence of a claim of illegality or erroneous assessment, to (A) determine the legality of the assessment or (B) secure a refund of such taxes.

(3) Pursuant to subparagraph (a) (2) above, the reasonable costs of any action taken by the contractor at the direction or with the concurrence of the contracting officer. Interest or penalties incurred by the contractor for non-payment of any tax at the direction of the contracting officer or by reason of the failure of the contracting officer to ensure timely direction after a prompt request.

(b) The following types of costs are not allowable:

(1) Federal income and excess profits taxes.

(2) Taxes in connection with financing, refinancing, refunding operations, or reorganizations (see 31.205-20 and 31.205-27).

(3) Taxes from which exemptions are available the contractor directly, or available to the contractor bases on an exemption afforded the Government, except when the contracting officer determines that the administrative burden incident to obtaining the exemption outweighs the corresponding benefits accruing the Government. When partial exemption from a tax is attributable to Government contract activity, taxes charged to such work in excess of that amount resulting from application of the preferential treatment are unallowable. These provisions intend that tax preference attributable to Government contract activity be realized by the Government. The term "exemption" means freedom from taxation in whole or in part and includes a tax abatement or reduction resulting from mode of assessment, method of calculation, or otherwise.

(4) Special assessments on land that represent capital improvements.

(5) Taxes (including excises) on real or personal property, or on the value, use, possession or sale thereof, which is used solely in connection with work other than on Government contracts (see paragraph (c) below).

(6) Taxes on accumulated funding deficiencies of, or prohibited transactions involving, employee deferred compensation plans pursuant to Section 4971 or Section 4975 of the Internal Revenue Code of 1954, as amended.

(7) Income tax accruals designed to account for the tax effects of differences between taxable income and pretax income as reflected by the books of account and financial statements.

(c) Taxes on property (see subparagraph (b)(5) above) used solely in connection with either non-Government or Govern-

ment work should be considered directly applicable to the respective category of work unless the amounts involved are insignificant or comparable results would otherwise by obtained; e.g., taxes on contractor-owned work-in-progress which is used solely in connection with non-Government work should be allocated to such work; taxes on contractor-owned work-in-process inventory (and Government-owned work-in-process inventory when taxes) used solely in connection with Government work should be charged to such work. The cost of taxes incurred on property used in both Government and non-Government work shall be apportioned to all such work based upon the use of such property on the respective final cost objectives.

(d) Any taxes, interest, or penalties that were allowed as contract costs and are refunded to the contractor shall be credited or paid to the Government in the manner it directs. However, any interest actually paid or credited to a contractor incident to a refund of tax, interest, or penalty shall be paid or credited the the Government only to the extent that such interest accrued over the period during which the contractor had been reimbursed by the Government for the taxes, interest, or penalties.

APPENDIX G

Mo. Rev. Stat. §144.010 (Supp. 1992)

Definitions - rules suspension and reinstatement-procedure.-1. The following words, terms, and phrases when used in sections 144.010 to 144.510 have the meanings ascribed to them in this section, except when the context indicates a different meaning:

(1) **"Admission"** includes seats and tables, reserved or otherwise, and other similar accommodations and charges made therefor and amount paid for admission, exclusive of any admission tax imposed by the federal government or by sections 144.010 to 144.510;

(2) **"Business"** includes any activity engaged in by any person, or caused to be engaged in by him, with the object of gain, benefit or advantage, either direct or indirect, and the classification of which business is of such character as to be subject to the terms of sections 144.010 to 144.510. The isolated or occasional sale of tangible personal property, service, substance, or thing, by a person not engaged in such business, does not constitute engaging in business within the meaning of sections 144.010 to 144.510 unless the total amount of the gross receipts from such sales, exclusive of receipts from the sale of tangible personal property by persons which property is sold in the course of the partial or complete liquidation of a household, farm or nonbusiness enterprise, exceeds three thousand dollars in any calendar year. The provision of this subdivision shall not be construed to make any sale of property which is exempt from sales tax or use tax on June 1, 1977, subject to that tax thereafter;

(3) **"Gross receipts"**, except as provided in section 144.012, means the total amount of the sale price of the sales at retail including any services other than charges incident to the extension of credit that are a part of such sales made by the businesses

herein referred to, capable of being valued in money, whether received in money or otherwise; except that, the term "gross receipts" shall not include the sale price of property returned by customers when the full sale price thereof is refund either in cash or by credit. In determining any tax due under sections 144.010 to 144.510 on the gross receipts, charges incident to the extension of credit shall be specifically exempted. For the purposes of sections 144.010 to 144.510 the total amount of the sale price above mentioned shall be deemed to be the amount received. It shall also include the lease or rental consideration where the right to continuous possession or use of any article of tangible personal property is granted under a lease or contract and such transfer of possession would be taxable if outright sale were made and, in such cases, the same shall be taxable as if outright sale were made and considered as a sale of such article, and the tax shall be computed and paid by the lessee upon the rentals paid;

(4) **"Motor vehicle leasing company"** shall be a company obtaining a permit from the director of revenue to operate as a motor vehicle leasing company. Not all persons renting or leasing trailers or motor vehicles need to obtain such a permit; however, no person failing to obtain such a permit may avail itself of the optional tax provisions of subsection 5 of section 144.070, as hereinafter provided;

(5) **"Person"** includes any individual, firm, copartnership, joint adventure, association, corporation, municipal or private, and whether organized for profit or not, state, county, political subdivision, state department, commission, board, bureau or agency, except the state highways and transportation department, estate, trust, business trust, receiver or trustee appointed by the state of federal court, syndicate, or any other group or combination acting as a unit, and the plural as well as the singular number;

(6) **"Purchaser"** means a person who purchases tangible personal property or to whom are rendered services, receipts from which are taxable under sections 144.010 to 144.510;

(7) **"Sale"** or **"sales"** includes installment and credit sales, and the exchange of properties as well as the sale thereof for money, every closed transaction constituting a sale, and means any transfer, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for valuable consideration and the rendering, furnishing or selling for a valuable consideration and the rendering, furnishing or selling for a valuable consideration any of the substances, things and services herein designated and defined as taxable under the terms of sections 144.010 to 144.510;

(8) **"Sale at retail"** means any transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration; except that, for the purposes of sections 144.010 to 144.510 and the tax imposed thereby; (i) purchases of tangible personal property made by duly licensed physicians, dentists, optometrists and veterinarians and used in the practice of their professions shall be deemed to be purchases for use or consumption and not for resale; and (ii) the selling of computer printouts, computer output or microfilm or microfiche and computer assisted photo compositions to a purchaser to enable the purchaser to obtain for his own use the desired information contained in such computer printouts, computer output on microfilm or microfiche and computer assisted photo compositions shall be considered as the sale of a service and not as the sale of tangible personal property. Where necessary to conform to the context of sections 144.010 to 144.510 and the tax imposed thereby, the term "sale at retail" shall be construed to embrace:

(a) Sales of admission tickets, cash admissions, charges and fees to or in places of amusement, entertainment and recreation, games and athletic events;

(b) Sales of electricity, electrical current, water and gas, natural or artificial, to domestic, commercial or industrial consumers;

(c) Sales of service to telephone subscribers and to others through equipment of telephone subscribers for the transmission of messages and conversations, both local or long distance, and the sale, rental or leasing of all equipment or services pertaining or incidental thereto;

(d) Sales of service for transmission of messages by telegraph companies;

(e) Sales or charges for all rooms, meals and drinks furnished at any hotel, motel, tavern, inn, restaurant, eating house, drugstore, dining car, tourist camp, tourist cabin, or other place in which rooms, meals or drinks are regularly served to the public;

(f)Sales of tickets by every person operating a railroad, sleeping car, dining car, express car, boat, airplane, and such buses and trucks as are licensed by the transportation division of the department of economic development of Missouri, engaged in the transportation of persons for hire;

(9) **"Seller"** means a person selling or furnishing tangible personal property or rendering services, on the receipts from which a tax is imposed under section 144.020;

(10) The noun **"tax"** means either the tax payable by the purchaser of a commodity or service subject to tax, or the aggregate amount of taxes due from the vendor of such commodities or services during the period for which he is required to report his collections, as the context may require.

2. For purposes of the taxes imposed under sections 144.010 to 144.510, and any other provisions of law pertaining to sales or use taxes which incorporate the provisions of sections 144.010 to 144.510 by reference, the term "manufactured homes" shall have the same meaning given it in section 700.010. RSMo.

3. Any rule or portion of a rule promulgated pursuant to this chapter may be suspended by the joint committee on administrative rules if after hearing thereon the committee finds that such rule or portion of the rule is beyond or contrary to the statutory authority of the agency which promulgated the rule, or is inconsistent with the legislative intent of the authorizing statute. The general assembly may reinstate such rule by concurrent resolution signed by the governor.

4. Sections 144.010 to 144.510 may be known and quoted as the "Sales Tax Law".

APPENDIX H

Mo. Rev. Stat. § 144.020 (1986)

Rate of Tax.- 1. A tax is hereby levied and imposed upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state. The rate of tax shall be as follows:

(1) Upon every retail sale in this state of tangible personal property, a tax equivalent to four percent of the purchase price paid or charged, or in case such sale involves the exchange of property, a tax equivalent to four percent of the consideration paid or charged, including the fair market value of the property exchanged at the time and place of the exchange, except as otherwise provided in section 144.025;

(2) A tax equivalent to four percent of the amount paid for admission and seating accommodations, or fees paid to, or in any place of amusement, entertainment or recreation, games and athletic events;

(3) A tax equivalent to four percent of the basic rate paid or charged on all sales of electricity or electrical current, water and gas, natural or artificial, to domestic, commercial or industrial consumers;

(4) A tax equivalent to four percent on the basic rate paid or charged on all sales of service to telephone subscribers and to others through equipment of telephone subscribers for the transmission of messages and conversations, both local and long distance, and upon the sale, rental or leasing of all equipment or services pertaining or incidental thereto; except that, the payment made by telephone subscribers or others, pursuant to section 144.060, shall not be considered as amounts paid for communication or telephone services or equipment;

(5) A tax equivalent to four percent of the basic rate paid or charged for all sales of services for transmission of messages of telegraph companies;

(6) A tax equivalent to four percent on the amount of sales or charges for all rooms, meals and drinks furnished at any hotel, motel, tavern, inn, restaurant, eating house, drugstore, dining car, tourist cabin, tourist camp or other place in which rooms, meals or drinks are regularly served to the public;

(7) A tax equivalent to four percent of the amount paid or charged for intrastate tickets by every person operating a railroad, sleeping car, dining car, express car, boat, airplane and such buses and trucks as are licensed by the transportation division of the department of economic development of Missouri, engaged in the transportation of persons for hire;

(8) A tax equivalent to four percent of the amount paid or charged for rental or lease of tangible personal property, provided that if the lessor or rentor of any tangible personal property had previously purchased the property under the conditions of **"sale at retail"** as defined in subdivision (8) of section 144.010 and the tax was paid at the time of purchase, the lessor or rentor shall not apply or collect the tax on the subsequent lease or rental receipts from that property. The purchase or use of motor vehicles, trailers, boats, and outboard motors shall be taxed and the tax paid as provided in sections 144.070 and 144.440, and no such tax shall then be collected on the rental or lease of motor vehicles, trailers, boats, and outboard motors, except as provided in sections 144.070 and 144.440. In no event shall the rental or lease of boats and outboard motors be considered a sale, charge, or fee to, for, or in places of amusement, entertainment or recreation, nor shall any such rental or lease by subject to any tax imposed to, for, or in such places of amusement, entertainment or recreation. Rental and leased boats or outboard motors shall be taxed under the provisions of the sales tax laws as provided

under such laws for motor vehicles and trailers. Tangible personal property which is exempt from the sales or use tax under section 144.030 upon a sale thereof is likewise exempt from the sales or use tax upon the lease or rental thereof.

2. All tickets sold which are sold under the provisions of sections 144.010 to 144.510 which are subject to the sales tax shall have printed, stamped or otherwise endorsed thereon, the words "This ticket is subject to a sales tax."

APPENDIX I

Mo. Rev. Stat. § 144.190 (Supp.1992)

Refund of overpayments—claim for refund—time for making claims—paid to whom—direct pay agreement for certain purchasers, collection fee deduction not permitted.

—1. If a tax has been incorrectly computed by reason of a clerical error or mistake on the part of the director of revenue, such fact shall be set forth in the records of the director of revenue, and the amount of the overpayment shall be credited on any taxes then due from the person legally obligated to remit the tax under sections 144.010 to 144.525, and the balance shall be refunded to the person legally obligated to remit the tax, his administrators or executors, as provided for in section 144.200.

2. If any tax, penalty or interest has been paid more than once or has been erroneously or illegally collected, or has been erroneously or illegally computed, such sum shall be credited on any taxes then due from the person legally obligated to remit the tax under sections 144.010 to 144.510 and the balance, with interest as determined by section 32.065, RSMo, shall be refunded to the person legally obligated to remit the tax, buy no such credit or refund shall be allowed unless duplicate copies of a claim for refund are filed within three years from date of over payment.

3. Every claim for refund must be in writing under oath, and must state the specific grounds upon which the claim is founded. Any refund or any portion thereof which is erroneously made, and any credit or any portion thereof which is erroneously allowed, may be recovered in any action brought by the director of revenue against the person legally obligated to remit the tax. In the event that a tax has been illegally imposed against a person legally obligated to remit the tax, the director of revenue shall authorize the cancellation of the tax upon his record.

4. Notwithstanding the provisions of this section, the director of revenue shall authorize direct pay agreements to puchasers which have annual purchases in excess of seven hundred fifty thousand dollars pursuant to rules and regulations adopted by the director of revenue. For the purposes of such direct pay agreements, the taxes authorized under chapters 66, RSMo, 67, RSMo, 67 92, RSMo, and 94, RSMo, shall be remitted based upon the location of the place of business of the purchaser. The deduction allowed in section 144.140 shall not be allowed to any person who is qualified to receive and has received the direct payment authorization as provided by this subsection.

No. 92-1297

In the Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM H. MELCHER, ACTING DIRECTOR OF REVENUE OF MISSOURI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

WILLIAM C. BRYSON
Acting Solicitor General

MICHAEL L. PAUP
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QUESTIONS PRESENTED

1. Whether the United States has standing to maintain the federal cause of action for money had and received to recover federal funds paid by a federal contractor under an unlawful state tax assessment.

2. Whether, in a suit brought by the United States, the federal courts should abstain from deciding the validity of a state tax assessment under state law.

3. Whether the Anti-Injunction Act, 28 U.S.C. 1341, denies jurisdiction to the district court to grant injunctive relief to the United States from enforcement of an invalid state tax.

4. Whether the property purchased by the federal contractor for the United States was subject to the state sales and use tax.

5. Whether the United States, without complying with state tax refund procedures or state statutes of limitations, may proceed in federal court under the federal common law action for money had and received to recover state sales and use taxes unlawfully collected from a federal contractor.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A15) is reported at 975 F.2d 511. The opinions of the district court (Pet. App. A19-A36 and A37-A48) are reported at 772 F. Supp. 453 and 729 F. Supp. 671.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1992. A petition for rehearing was denied on November 6, 1992 (Pet. App. A1). The petition for a writ of certiorari was filed on February 3, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On November 3, 1985, the United States contracted with Olin Corporation to manage, operate and maintain the federally owned Lake City Ammunition Plant. The Plant manufactures ammunition for the United States Army (Pet. App. A3, A20-A21). Under the federal management contract, the United States pays Olin a management fee and reimburses Olin for the cost of materials acquired for operation of the Plant (*id.* at A3, A7, A20-A21). The contract provides that title to materials purchased by Olin passes directly from vendors to the United States upon delivery at the Plant (*id.* at A3, A21).[1] Olin was free to select the vendors from whom materials were purchased but was required to report to the United States on its operations. Most tasks were subject to the direction or approval of the Army's contracting officer (*id.* at A21).

From November 1985 until April 1988, Olin paid Missouri sales and use taxes assessed on materials purchased for use at the Plant. Pursuant to the federal contract, the United States reimbursed Olin for the cost of these purchases and the taxes paid on them (Pet. App. A3, A20).

2. The United States brought suit in district court seeking (i) a declaration that, under Missouri law, the purchases Olin made under its contract with the United States were not subject to the State's sales and use taxes, (ii) an injunction restraining petitioners from attempting to collect such taxes and (iii) a refund of the sales and use taxes that had been paid by Olin and reimbursed by the United States (Pet. App. A19-A20).

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[1] The purchase orders placed by Olin similarly provided for passage of title directly to the United States (Pet. App. A3, A21).

The district court rejected petitioners' claim that the United States lacks standing to bring this action. The court noted that, under the federal management contract, the United States was contractually obligated to reimburse Olin for the taxes it paid. Erroneous state tax assessments thus cause a direct pecuniary injury to the United States and give it standing to challenge the state tax (Pet. App. A40-A41). The district court also rejected petitioners' contentions (i) that 28 U.S.C. 1341 bars the injunctive relief sought by the United States (Pet. App. A41-A47) and (ii) that the federal courts should abstain from deciding questions concerning state tax law in a suit brought by the United States (*id.* at A47). The court held that the federal common law cause of action for money had and received authorizes recovery of unlawful state tax assessments and that the federal claim is not subject to state-law administrative tax refund requirements or the state statute of limitations (*id.* at A21-A24).

Reaching the merits of the state tax, the district court granted summary judgment to the United States. The court held that Olin's purchases of materials for use in Plant operations are purchases for resale to the United States under the federal contract and are therefore not taxable under state law (Pet. App. A24-A36). The court enjoined petitioners from "imposing or collecting Missouri sales or use taxes on purchases of tangible personal property made by Olin Corporation under the terms of its contract with the United States Department of the Army for the operation of the Lake City Army Ammunition Plant" (*id.* at A17). The court further ordered petitioners to refund $683,630 in sales and use taxes that Olin had paid and for which it had been re-

imbursed by the United States, together with prejudgment interest (*id.* at A17-A18).

3. The court of appeals affirmed the district court in all respects other than the award of prejudgment interest, which it reversed (Pet. App. A2-A15).[2] With respect to petitioners' argument that the Anti-Injunction Act, 28 U.S.C. 1341, bars injunctive relief in an action brought by the United States, the court of appeals stated (Pet. App. A4):

> At the heart of this dispute lies the contractual relationship between the United States and Olin. To determine whether the transfers between the original vendors and Olin, and the subsequent transfers by Olin to the United States amounted to a "sale for resale" under Mo. Rev. Stat. § 144.010.1(8) (1986), the contract between Olin and the government must be examined. The interpretation of a contract between the United States and another party depends on federal law. * * * In such a situation, the Tax Injunction Act does not bar the United States from seeking a resolution of this federal question in a federal forum.

The court of appeals also rejected petitioners' standing and abstention arguments, noting that the United States is the party suffering monetary harm from unlawful imposition of the challenged state tax. The court pointed out that petitioners' suggestion that Olin—rather than

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[2] The United States filed a petition for a writ of certiorari (No. 92-1296) with respect to the court of appeals' ruling on the prejudgment interest issue. We suggested that the question presented in that petition should be disposed of in light of the Court's resolution of *United States* v. *Texas*, No. 91-1729 (argued Mar. 1, 1993).

the United States—should bring this suit would require an unnecessary "circuity of action" (*id.* at A5).

The court next rejected petitioners' argument that the federal common law cause of action for money had and received is subject to state administrative tax refund procedures and state statutes of limitations (Pet. App. A5 n.1). Noting that this issue is before this Court in *United States* v. *California*, No. 91-2003 (argued Feb. 23, 1993), the court stated that it found "more persuasive the reasoning of *United States* v. *Broward County, Florida*, 901 F.2d 1005 (11th Cir. 1990), which allowed the United States to proceed" in a similar case (Pet. App. A5 n.1).

On the merits, the court of appeals held that the purchases made by Olin under the federal contract were not sales "at retail" (Mo. Rev. Stat. § 144.020.1 (1986)) under Missouri law. Instead, they were nontaxable sales for resale to the United States (Pet. App. A5-A8).

The dissenting judge agreed that Olin's purchases were not subject to the Missouri sales and use taxes (Pet. App. A13 n.2). He concluded, however, that the United States lacks standing to challenge the state tax because, in his view, the government is not obligated to reimburse sales and use taxes that its contractor did not owe (*id.* at A10-A14).

ARGUMENT

The court of appeals correctly resolved the questions presented in the petition. But see note 2, *supra*. There are no grounds warranting further review of the first four questions. The fifth question is similar to the question to be addressed by this Court in *United States* v. *California*, No. 91-2003 (argued Feb. 23, 1993), and should be disposed of as appropriate in light of the Court's resolution of that case.

1. The court of appeals correctly held (Pet. App. A5) that the United States has standing to challenge the state tax. The United States has an obvious and meaningful financial stake in application of the state tax to purchases of property in the name of the United States for use at the federally owned ammunition plant in Missouri. Under the standard terms of the federal management contract, the federal contractor is entitled to reimbursement for state taxes that it must pay or that it pays under "a claim of illegality or erroneous assessment" (48 C.F.R. 31.205-41(a)(2)). Since the economic burden of the state tax falls upon the United States, the United States (as the real party in interest) suffers a distinct and palpable injury fairly traceable to petitioners' challenged conduct—and therefore has standing to challenge the tax. See *Lujan* v. *Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992); *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472-473 (1982); *Maryland* v. *Louisiana*, 451 U.S. 725, 736 (1981); *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976).

The courts of appeals have consistently agreed that the United States has standing to sue state and local governments to recover federally reimbursed tax payments made by federal contractors. See, *e.g.*, *United States* v. *Colorado*, 627 F.2d 217, 219 (10th Cir. 1980), aff'd *sub nom. Jefferson County* v. *United States*, 450 U.S. 901 (1981); *United States* v. *Nevada Tax Commission*, 439 F.2d 435 (9th Cir. 1971); *United States* v. *Bureau of Revenue of New Mexico*, 291 F.2d 677 (10th Cir. 1961). There is no conflict among the circuits or other ground warranting further review of this issue.

2. Petitioners err in contending (Pet. 13-17) that federal courts should abstain from deciding questions con-

cerning state tax law in a suit brought by the United States. In *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 813-818 (1976), the Court stated that abstention may be proper (i) when there is an unsettled issue of state law subject to a constitutional challenge that could be resolved in a manner that makes adjudication of the constitutional challenge unnecessary; (ii) when the federal court's jurisdiction is invoked to enjoin on constitutional grounds the continuation of state criminal or quasi-criminal judicial proceedings; and (iii) when there is a difficult and complex state law issue that pertains to state policy problems of such great import and interest to the State as to transcend the interest of the plaintiff. Petitioners argue that the present case comes within the third ground for abstention (Pet. 15).

As the lower courts recognized (Pet. App. A4-A8, A24-A31, A44), however, this action does not involve interpretation of an ambiguous state law that has not previously been interpreted. As the court of appeals correctly held (*id.* at A8, A13 n.2), the Supreme Court of Missouri, in an analogous factual context, has elaborated on the meaning of a "sale at retail" under Missouri tax law (*Canteen Corp.* v. *Goldberg*, 592 S.W.2d 754 (Mo. 1980) (en banc)). Direct application of the *Canteen Corp.* decision requires the conclusion that the purchases by the federal contractor in this case are not "sale[s] at retail" under Missouri law (Pet. App. A8). Moreover, as the lower courts recognized (*id.* at A4, A26, A44), the question whether the purchases by the federal contractor are "at retail" ultimately involves interpretation of the federal contract, which is a question of federal law to be determined by federal courts (*United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979); *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 366 (1943)).

Abstention is particularly inappropriate in cases brought by the United States. Congress has conferred plenary jurisdiction on United States district courts over "all civil actions, suits or proceedings commenced by the United States" (28 U.S.C. 1345). The courts of the United States should not decline to exercise the plenary jurisdiction that Congress has expressly conferred over "all" claims of the United States. The court of appeals thus correctly declined to abstain in this case. See *United States* v. *Anderson County*, 705 F.2d 184 (6th Cir.), cert. denied, 464 U.S. 1017 (1983).[3]

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[3] In support of the contention that abstention is appropriate in this case, petitioners cite *Allegheny County* v. *Frank Mashuda Co.*, 360 U.S. 185 (1959), *New Orleans Public Service, Inc.* v. *Council of New Orleans*, 491 U.S. 350 (1989), and *United States* v. *City of New York*, 175 F.2d 75 (2d Cir.), cert. denied, 338 U.S. 885 (1949). But *Allegheny County* and *New Orleans Public Service, Inc.* are not relevant because those cases did not involve the United States or the plenary jurisdiction of federal courts over the claims of the United States under 28 U.S.C. 1345. In *City of New York*, the court of appeals declined to consider a request by the United States for an injunction against a state tax because the validity of the tax turned solely on a state law question that "the state courts are peculiarly fitted to answer" and because the United States had a "wholly adequate remedy [at law] * * * in the state courts." 175 F.2d at 77. In the present case, however, the United States seeks damages under the federal common law cause of action for money had and received. Its action arises under federal law, and issues of state law form only an ingredient of the federal cause of action. See, *e.g.*, *United States* v. *Broward County*, 901 F.2d 1005, 1007-1008 (11th Cir. 1990); *United States* v. *Michigan*, 851 F.2d 803, 810 (6th Cir. 1988); *City of New Orleans* v. *United States*, 371 F.2d 21, 28 (5th Cir.), cert. denied, 387 U.S. 944 (1967). Moreover, unlike *City of New York*, issues of federal contract law are a necessary element of the government's claim in this case. In these circumstances, the courts have uniformly concluded that abstention is inappropriate. See, *e.g.*, *United States* v. *Anderson*

3. The Anti-Injunction Act, 28 U.S.C. 1341, does not preclude the injunctive relief that the United States requested in this case. While the Act generally denies jurisdiction to federal district courts to enjoin collection of state taxes, its provisions are not applicable to suits brought by the United States. *Department of Employment* v. *United States*, 385 U.S. 355, 357-358 (1966).

Petitioners err in contending (Pet. 18-24) that the Anti-Injunction Act bars injunctive claims of the United States that do not challenge the constitutionality of the state tax. The courts of appeals have consistently rejected that contention. They have concluded that the Act does not bar injunctive relief for the United States whether the challenge to the state tax is based upon the Constitution or upon state law. *United States* v. *Broward County*, 901 F.2d 1005, 1008 (11th Cir. 1990); *United States* v. *Anderson County*, 705 F.2d at 188; *United States* v. *Bureau of Revenue of New Mexico*, 291 F.2d at 679. See also *United States* v. *Arlington County*, 326 F.2d 929, 931 (4th Cir. 1964); *United States* v. *Woodworth*, 170 F.2d 1019, 1020 (2d Cir. 1948); *City of Springfield* v. *United States*, 99 F.2d 860, 862 (1st Cir. 1938), cert. denied, 306 U.S. 650 (1939).

Petitioners' contention (Pet. 18-20) that *United States* v. *Livingston*, 179 F. Supp. 9 (E.D.S.C. 1959), aff'd, 364 U.S. 281 (1960), *United States* v. *Montgomery County*, 761 F.2d 998 (4th Cir. 1985), and *Franchise Tax Board of California* v. *Alcan Aluminum Ltd.*, 493 U.S. 331 (1990), hold to the contrary is misplaced. *Franchise Tax Board of California* did not involve the United States. In *Livingston* and *Montgomery County*, the courts held that 28

County, 705 F.2d at 187-188; *United States* v. *Bureau of Revenue of New Mexico*, 291 F.2d at 679.

U.S.C. 1341 did *not* bar the injunctive relief sought by the United States in those cases. There is thus no conflict among the circuits on this issue to warrant further review.

4. Petitioners also seek review of the merits of the tax dispute (Pet. 20-24). The courts below (including the dissenting judge in the court of appeals) unanimously and correctly held (Pet. App. A5-A8, A13 n.2, A24-A31) that the purchases made by Olin were exempt from the Missouri sales and use tax as sales for resale under Mo. Rev. Stat. § 144.010.1(8) (1986). As they point out (Pet. App. A8, A13 n.2), under the terms of the federal contract, and under the reasoning of the Missouri Supreme Court in *Canteen Corp.* v. *Goldberg*, *supra*, the initial purchases by Olin were for resale to the United States. They were therefore exempt from the state tax under the plain language of the state statute (Mo. Rev. Stat. § 144.010.1(8) (1986)). Further review of this state law determination by the court of appeals is not warranted. See *Richards* v. *United States*, 369 U.S. 1, 16 n.35 (1962).[4]

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[4] Petitioners' reliance (Pet. 21-22) on *Overland Steel, Inc.* v. *Director of Revenue*, 647 S.W.2d 535 (Mo. 1983) (en banc); *Odorite of America, Inc.* v. *Director of Revenue*, 713 S.W.2d 833 (Mo. 1986) (en banc); and *State ex rel. Thompson-Stearns-Roger* v. *Schaffner*, 489 S.W.2d 207 (Mo. 1973), is misplaced. *Overland Steel* involved the special rules concerning construction contractors who incorporate purchased materials into construction projects and are therefore said to "consume[] the materials," rather than resell them. See 647 S.W.2d at 537-538. The rules pertaining to construction contractors are not applicable to Olin, which purchases materials merely as manager of the ammunition plant owned by the United States. In *Odorite*, unlike the present case, the property subject to the state tax was not transferred to any further party and thus did not qualify as a sale for resale under Mo. Rev. Stat. § 144.010.1(8) (1986). See 713 S.W.2d at 837-838.

Petitioners err in contending (Pet. 23-24) that the decision in this case conflicts with the decision of the Fourth Circuit in *United States* v. *Forst*, 569 F.2d 811 (4th Cir. 1978), aff'g 442 F. Supp. 920 (W.D. Va. 1977). In *Forst*, the court held a federal contractor liable for Virginia sales tax on purchases of property that it used in performing a federal contract. Since *Forst* involved Virginia law, not Missouri law, it of course cannot be said to be in conflict with the decision in this case. Moreover, the court in *Forst* applied the Virginia tax only to items purchased by a contractor who consumed them in performing the contract and did not transfer them to the custody of the United States. 442 F.Supp. at 925. In those circumstances, the *Forst* court concluded that no resale occurred. See *ibid.* In the present case, however, a resale did occur under the criteria of Missouri law (Mo. Rev. Stat. § 144.010.1(8) (1986)) as interpreted by the Missouri Supreme Court in the *Canteen Corp.* case (Pet. App. A8). There is thus no conflict between *Forst* and the decision in this case.

5. Petitioners finally contend (Pet. 24-28) that (i) the federal common law cause of action for money had and received does not authorize the United States to recover federal funds used to pay unlawful state taxes and, (ii) even if the federal cause of action does apply in these circumstances, the United States is barred from recovery in this case because it did not comply with state administrative tax refund procedures or with the statute of limitations applicable to tax refund suits under state law. These claims are similar to tho.e presented in *United*

Finally, as the district court noted (Pet. App. A27-A29), the question whether the contractor purchased the property for resale to the United States was not considered or raised in *Thompson-Stearns-Roger*.

States v. *California*, No. 91-2003 (argued Feb. 23, 1993). The Court may therefore wish to dispose of this issue in light of its decision in that case.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of this Court's decision in *United States* v. *California*, No. 91-2003. In all other respects, it should be denied.

Respectfully submitted.

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No. 92-1297

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM H. MELCHER, Acting Director
of the Missouri Department of Revenue,
THE MISSOURI DEPARTMENT OF REVENUE, and
THE STATE OF MISSOURI,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITIONERS' REPLY BRIEF TO BRIEF IN OPPOSITION

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On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY BRIEF TO BRIEF IN OPPOSITION

1. Respondent urges this Court to deny certiorari concerning the issue of standing by misleading the Court and misstating the record. For the first time in this litigation respondent references 48 C.F.R. § 31.205-41(a)(2) and states that under the contract, "the federal contractor is entitled to reimbursement for state taxes that it must pay or that it pays under 'a claim illegality or erroneous assessment.'" Respondent's Brief, p. 6. These are not the facts of this case. The monies which respondent seeks in this action were funds voluntarily paid by Olin Corporation, the

federal contractor. Olin did not pay these taxes under a claim of illegality nor did the Missouri Department of Revenue issue an assessment to Olin concerning the monies which respondent seeks refunded in this action. Therefore, respondent's reference to §31.205-41(a)(2) is factually incorrect. Rather, § 31.205-41(b)(3) applied to respondent's reimbursement of the taxes paid by Olin. Pursuant to that section, respondent's reimbursement of Olin's tax payments was gratuitous. Hence, respondent was not injured by petitioners' conduct and has no standing.

Misstating the record, respondent argues that it has an "obvious and meaningful financial stake in application of the state tax to purchases of property in the name of the United States . . .." Respondent's Brief, p. 6. Respondent admitted in responses to requests for admissions "that Olin placed orders with third-party suppliers in *its own name* for all property which plaintiff (respondent) contends is not subject to taxation by defendants (petitioners)." R 795 (emphasis added). Olin's purchases were made in its own name not in the name of the United States. It is clear in this case that the United States seeks to litigate in federal court the meaning of a state tax exemption in order to secure a refund of taxes paid by Olin Corporation and voluntarily reimbursed by respondent. Under these circumstances, respondent lacks standing.

2. Respondent suggests that the lower courts correctly refused to abstain from this case for reasons of comity and federalism because there is nothing complicated in Missouri's tax law warranting abstention. Respondent is incorrect.

Both the Eighth Circuit and the District Court rely on a Missouri regulation, specifically, 12 CSR 10-3.012(3), to support the conclusion that Olin resells the property at issue here to the federal government. See Petitioners' Appendix A-8 and A-30. Subsequent to the filing of the petition, this rule was rescinded because it "misstates the sales tax law as it applies to persons who do not have an ownership interest in or title to

tangible personal property." See Supplemental Appendix attached hereto. The Administrative Hearing Commission, the Missouri body which would ordinarily resolve a sale for resale claim, could have determined that the state regulation relied upon by the District Court and the Eighth Circuit was invalid. See *Bridge Data Co. v. Director of Revenue*, 794 S.W.2d 204, 207 (Mo. banc 1990) (Administrative Hearing Commission may determine that revenue regulations exceed state law). Federal courts are not likely to have the state taxation expertise to evaluate the policy implications and validity of state regulations as evidenced by the lower courts' failure to do so here. It is quite clear in this case, described by the District Court as one of first impression, that there are difficult and complex state law issues that pertain to state policy problems of great importance. Under these circumstances and because respondent only seeks to litigate the exclusion of its contractor's purchases from state taxation pursuant to state tax law, abstention is required.

Respondent contends that "whether the purchases of the federal contractor are at retail ultimately involves interpretation of the federal contract, which is a question of federal law . . .." Respondent's Brief, p. 7. Yet neither respondent nor the lower courts have cited those ambiguous provisions of the federal contract which they believe are in need of interpretation to reach the sale for resale determination they have all made. Rather, the sale for resale exclusion from state taxation must be decided on the facts of the transactions and by applying Missouri law to those facts, not on the characterization of the transactions contained in respondent's contract.

3. Finally, respondent suggest that this case should be resolved in a fashion identical to *U.S. v. California*, No. 91-2003 (argued Feb. 23, 1993). The decision of the Eighth Circuit should be reversed if *U.S. v. California* is affirmed. However, if *California* is reversed, this case will not be resolved. Based on the limited record available, petitioners find that there are at least two signifi-

cant factual distinctions between that case and the one before the Court suggesting a different result in the event of reversal.

The *California* case involves assessments against the federal contractor which were paid under protest. As stated above, this is not the factual situation here before the Court. Olin paid the taxes at issue without protest, claimed exemption or assessment and the respondent now seeks a refund of those funds. Furthermore, in *California,* the federal contractor paid the disputed taxes with funds provided by the United States; i.e., the taxes were paid with federal funds. In this case, the federal contractor paid the taxes with its own funds; i.e., Missouri holds a private entity's funds, not the federal government's funds. These two distinguishing facts suggest that respondent's interest in the funds it seeks to recover here is significantly more attenuated than in *California*. Consequently, petitioners' claim, that there exists no federal common law cause of action for the return of Olin's funds, cannot be resolved by reference to *California* if the Ninth Circuit's decision is reversed.

For the foregoing reasons, and those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

Title 12 — DEPARTMENT OF REVENUE

Division 10 — Director of Revenue

Chapter 3 — State Sales Tax

EMERGENCY RESCISSION

[Filed: Feb. 19, 1993]

12 CSR 10-3.012 Sellers Subject to Sales Tax. This rule addressed the sales tax law as it applied to the sale of tangible personal property by persons who do not have an ownership interest in or title to the tangible personal property.

PURPOSE: This Emergency Rescission rescinds 12 CSR 10-3.012, because the rule misstates the sales tax law as it applies to persons who do not have an ownership interest in or title to tangible personal property.

EMERGENCY STATEMENT: It is necessary that this rule be rescinded to ensure compliance with the revenue laws of this state requiring the assessment and collection of sales tax. In light of the fact that the rule does misstate the sales tax law, the director of revenue concludes there is an immediate risk to the public welfare which can be met through the Emergency Rescission of this rule.

Auth: section 144.270, RSMo (1986). This rule was previously filed as rule no. 28, Jan. 22, 1973, effective Feb. 1, 1973. S.T. regulation 010-5 was filed Dec. 31, 1975, effective Jan. 10, 1976. Amended: Filed Aug. 13, 1980, effective Jan. 1, 1981. Amended: Filed April 29, 1983, effective Sept. 11, 1983. Emergency rescission filed Feb. 19, 1993, effective March 1, 1983, expires June 28, 1993. A normal rescission covering this same material is published in the Notices of Proposed Rulemaking in this issue of the *Missouri Register*.